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905
No. 2430

**United States
Circuit Court of Appeals
For the Ninth Circuit.**

PARROTT & COMPANY, a Corporation,
Appellant,
vs.

DOLBADARN CASTLE SHIPPING COMPANY,
LIMITED, a Corporation, Claimant of the
British Bark "DOLBADARN CASTLE,"
Her Tackle, Apparel and Furniture,
Appellee.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL - 3 1914

F. D. Monckton,
Clerk.

No. 2430

United States
Circuit Court of Appeals
For the Ninth Circuit.

PARROTT & COMPANY, a Corporation,
Appellant,
vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

CLERK'S OFFICE.

No. 15,073.

PARROTT & COMPANY, a Corp.,

Libelant,

vs.

The British Bark "DOLBADARN CASTLE," etc.,
Respondent.

Praeceptum [for Certified Apostles on Appeal].

To the Clerk of Said Court:

Sir: Libelant herein having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the final Decree of this Court in the above-entitled cause, you are hereby requested to prepare and certify the Apostles on Appeal, to be filed in said Appellate Court on or before the first day of June, 1914, said Apostles to be prepared in accordance with Rule 4 of the "Rules in Admiralty" of said Appellate Court.

ANDROS & HENGSTLER,

Proctors for Libelant.

[Endorsed]: Filed May 16, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page number appearing at foot of page of original certified Record.

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,
Libellant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

Statement of Clerk U. S. District Court.

PARTIES.

LIBELANT: Parrott & Company, a Corporation.

RESPONDENT: The British Bark "Dolbadarn
Castle," Her Tackle, Apparel and Furniture.

CLAIMANT: Dolbadarn Castle Shipping Com-
pany, Limited, a Corporation. [2]

PROCTORS

for

LIBELANT: Messrs. Andros and Hengstler, San
Francisco, California.

RESPONDENT and CLAIMANT: Ira S. Lillick,
Esquire, San Francisco, California.

PROCEEDINGS.

1910.

September 12. Filed verified Libel, to recover dam-
ages. Issued Monition for attach-
ment of the Bark "Dolbadarn
Castle," which said Monition was
afterwards, on the 13th day of

September, 1910, returned and filed with the following return of the United States Marshal endorsed thereon: "In obedience to the within Monition I attached the British Bark 'Dolbadarn Castle,' therein described, on the 12th day of September, 1910, and have given due notice to all persons claiming the same that this Court will, on the 27th day of September, 190— (if that day be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I [3] posted a notice of attachment on said British Bark 'Dolbadarn' and handed a copy of this Monition to the Captain of said ship. I also placed a keeper thereon.

Attachment made in Bay of San Francisco.

C. T. ELLIOTT,

United States Marshal.

By Paul J. Arnerich,

Deputy.

San Francisco, Cal., Sept. 12th, 1910."

September 14. Filed Claim of Dolbadarn Castle Shipping Company, Ltd.

Filed Stipulation for the release of Bark "Dolbadarn Castle," in the sum of \$3,000.00 with the United States Fidelity & Guaranty Co. as surety.

28. Filed depositions of John Baxter, John Owen, Jan Olsson and Robert Conchar, taken on behalf of respondent, before Jas. P. Brown, U. S. Commissioner.

November 4. Filed Answer of The Dolbadarn Castle Shipping Company, Limited, owner of the British Bark "Dolbadarn Castle," together with Interrogatories propounded to libellant.

December 13. Filed exceptions of libellant to claimant's Answer and Interrogatories.
[4]

1911.

June 5. The exceptions to the Answer and Interrogatories filed herein this day came on for hearing in the above-entitled court, before Hon. John J. De Haven, Judge, and after argument the matter was submitted to the Court for decision.

8. Ordered Exceptions to the Answer and Interrogatories overruled.

1912.

January 2. Filed claimant's exceptions to Answer filed by libelant to the Interrogatories propounded by claimant.

January 27. The exceptions to the Answer filed by libelant to the Interrogatories propounded by claimant, this day came on for hearing in the District Court of the United States, for the Northern District of California, at San Francisco, before Hon. R. S. Bean, Judge, and after argument, the matter was submitted to the Court for decision.

February 3. Ordered exceptions to Answer filed by libelant to the Interrogatories propounded by claimant overruled. [5]

1913.

November 18. The above-entitled cause this day came on for hearing in the District Court of the United States for the Northern District of California, at the City and County of San Francisco, before the Honorable M. T. Dooling, Judge. The Court ordered that libelant be allowed to amend Libel as to extent of damages sustained by the consignee of cargo. After several hearings this cause was submitted to the

Court for consideration and decision on the 22d day of November, 1913.

1914.

- January 22. Filed Opinion, Dismissing Libel (M. T. Dooling, Judge).
 24. Filed Decree.
 February 10. Filed testimony taken in open court.
 17. Filed Notice of Appeal.
 26. Filed Bond on Appeal in the sum of \$500.00, with the United States Fidelity & Guaranty Company, as surety.
 May 16. Filed Assignment of Errors. [6]

In the District Court of the United States, in and for the Northern District of California.

No. —.

PARROTT & COMPANY, a Corporation,
 Libelant,
 vs.

The British Bark "DOLBADARN CASTLE," Her
 Tackle, Apparel and Furniture,
 Respondent.

Libel.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California:

THE LIBEL of Parrott & Company, a corporation, against the British Bark "Dolbadarn Castle," her tackle, apparel and furniture, and against all

persons lawfully intervening for their interests therein, in a cause of contract, civil and maritime, alleges:

I.

That at all the times hereinafter mentioned libellant was and now is a corporation organized and existing under the laws of the State of California, and doing business in the City and County of San Francisco, said State, as an importer and merchant.

II.

That on or about the 19th day of February, 1910, at the Port of Rotterdam, in the Kingdom of Belgium, the Societe Anonyme de Niel-on-Rupell shipped, in good order and condition, certain merchandise, to wit, Two Thousand Seven Hundred and Seventy-five (2,775) barrels of cement, on the said bark, then and there employed as a general ship in the transportation of cargoes, to be transported [7] from said Port of Rotterdam to the Port of San Francisco, and there to be delivered, in like good order and condition, unto order, or to his or their assignees.

That on or about the 19th day of February, 1910, at the said Port of Rotterdam, John P. Best & Company shipped, in good order and condition, certain merchandise, to wit, 2,023 sheets, on the said bark, then and there employed as a general ship in the transportation of cargoes from said Port of Rotterdam by said bark to the Port of San Francisco, and there to be delivered, in like good order and condition, unto order, or to his or their assigns.

That when said consignments were received on

board as aforesaid, the master of said ship entered into written contracts of affreightment, wherein and whereby said master agreed to transport said merchandise and to deliver the same as aforesaid. Copies of said contracts or bills of lading are attached hereunto, marked Exhibit "A" and Exhibit "B" and made a part of this libel.

III.

That thereafter said bark sailed from said Port of Rotterdam, bound for San Francisco, and arrived at San Francisco on or about the — day of —, 1910, with said consignments on board; but, notwithstanding the obligation of said contracts of affreightment, said consignments were not delivered to libelant or order in like good order or condition as when received, but, on the contrary, 50 barrels of cement were more or less damaged, and 185 tons of steel plates, carried under bill of lading Exhibit "B," were tendered to libelant or order in a damaged condition. That the damage caused to the said goods was caused while the same were on board and in the custody of said bark, by want of care of the master and owners of said bark in the stowage, transportation [8] and handling of said merchandise.

IV.

That by reason of the premises, libelant was damaged as follows: That the damage on said steel plates amounts approximately to the sum of Eighteen Hundred and Fifty Dollars (\$1850.00), and the damage to the cement approximately to the sum of One Hundred and Twelve and 50/100 Dollars (\$112.50), be-

ing a total damage of Nineteen Hundred and Sixty-two and 50/100 Dollars (\$1962.50). That the master, owners and agents of said ship, although thereunto requested, have failed and refused to pay to libelant said damages or any part thereof.

V.

That said bark "Dolbadarn Castle" is now in the Northern District of California, and within the jurisdiction of this court, and that all and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

WHEREFORE libelant prays that process in due form of law, according to the course of courts of admiralty and of this Honorable Court, in cases of admiralty and maritime jurisdiction, may issue against the said bark, her tackle, apparel and furniture, and that all persons claiming any right, title or interest therein may be cited to appear and answer, upon oath, all the matters aforesaid, and that this Honorable Court will be pleased to declare the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay said damages; and that libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

ANDROS & HENGSTLER,
Proctors for Libelant. [9]

Northern District of California,—ss.

R. H. Menzies, being duly sworn, deposes: I am an officer of the libelant corporation above mentioned, to wit, the secretary thereof, and as such authorized

to bring this action. I have read the foregoing libel and know the contents thereof, and the same are true, of my own knowledge, except as to those matters therein stated on information and belief, and as to those I believe the same to be true.

R. H. MENZIES.

Subscribed and sworn to this 12th day of September, 1910.

[Seal]

M. T. SCOTT,
Deputy Clerk U. S. District Court, Northern District of California. [10]

Exhibit "A" [to Libel—Bill of Lading].

CALIFORNIA TRADE BILL OF LADING.

JOHN P. BEST & CO.

General Ship & Forwarding Agents,

ANTWERP.

Sailing Vessels.

Freight Payable at Port of Discharge.

..... cubic feet at	per 40 c. f.	£
..... " " "	" 40 "	"
499,500 Kos at 18/- per ton of 1016 Ko	"	442.9.5
..... " " "	1000 "	"
	Minimum	"
		£ 442.9.5
	Primage	"
	Disbursements	"
	Primage	"
		£ 442:9:5

SAY:

Four hundred & forty two Pounds sterling.

nine Shillings.

five Pence Brt. Stg. PAY-

ABLE AT Destination. [11]

SHIPPED in good order and condition by the Societe Anonyme de Niel-on-Rupell on board the good Ship "Dolbadarn Castle," whereof is Master for this present voyage, Baxtre, lying in the port of ~~ANTWERP~~ ROTTERDAM and bound for San Francisco (Cal).

Label Josson

2775 (Two thousand seven hundred and seventy-five) Barrels Cement Kos. 499,500.

(TRADEMARK LABEL OF JOSSON & CO.)

In transit wholly or part.

being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition, at the aforesaid port of San Francisco unto Order or to his or their assigns. Average as per York-Antwerp Rules 1890. Freight for the said Goods and primage together, to be paid on delivery, as per endorsement, in cash, without deduction, at the exchange of \$4.85 per pound sterling.

Consignees to pay double freight on all weight found over and above the weight entered on this Bill of Lading, and also any extra expenses incurred in connection with weighing, should the weight be found on landing to be in excess of that entered in Bill of Lading.

The following are the exceptions and stipulations referred to: The act of God, the King's Enemies,

loss or damage from fire on board, in hulk or craft, or one shore, arrest and/or restraint of Princes, Rulers and People, Collision, any act, neglect, or default wathsoever of Pilot, Master or Crew in the management or Navigation of the Ship, and all and every danger and accidents [12] of the Seas, Canals, and Rivers, and of navigation of whatever nature or kind always mutually excepted. The vessel to have liberty to call at any ports in any order to sail without pilots and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

The Ship is not liable for leakage, breakage, loss or damage by heat, sweat, rust, or decay, unless occasioned by improper stowage.

The Ship will not be liable for gold, silver, bullion, specie, jewellery, precious stones, or precious metals, unless Bills of Lading are signed for such goods, and the value declared therein.

If goods of a dangerous nature are shipped without being previously arranged for, they are liable to be thrown overboard, and their loss as well as any loss or damage to the Ship or cargo will fall upon the Shippers or Owners of such goods.

The Master is to deliver the Goods with all reasonable despatch; and the consignees are to be ready to receive them within forty-eight hours after the Ship commences to unload, otherwise the Master or Agent may discharge and store them at the expense and risk of the Owners of the Goods.

IN WITNESS WHEREOF, the Master, Owner, or Agent, of the said Ship, has signed three Bills of Lading, exclusive of the Master's copy, all of this

tenor and date, one of which being accomplished, the others to stand void.

Weight, measure and contents, unknown.

Dated in ~~Antwerp~~ 19th February, 1910.

Rotterdam

JOHN BAXTER,
Master. [13]

SOCIETE ANONYME DE NIEL-ON-
RUPELL.

ANCIENNE FABRIQUE DE CIMENT
PORTLAND, JOSSON & CO.

L'Agent Comptable, L'Administrateur-Gerant,
R. W. MAURY & CO. G. DEROOVER. [14]

Exhibit "B" [to Libel—Bill of Lading].

CALIFORNIA TRADE BILL OF LADING.

JOHN P. BEST & CO.

General Ship & Forwarding Agents,
ANTWERP.

Sailing Vessels.

Freight Payable at Port of Discharge.

..... cubic feet at	per 40 c. f.	£
..... " " "	" 40 "	"
305,210 Kos at 18/- per ton of 1016 Ko	"	279.4.5
..... " " "	" 1000 "	"
	Minimum	"
		£ 279.4.5
	Primage	"
	Disbursements	"
	Primage	"
		£ 279.4.5

SAY:

Two hundred seventy-nine Pounds sterling.

four

Shillings.

five

Pence Brt. Stg. PAY-

ABLE AT Destination. [15]

SHIPPED in good order and condition by John P. Best & Co. (as agents) on board the good Ship Dolbadarn Castle, whereof is Master for this present voyage, Baxter, lying in the port of ~~ANTWERP~~ ROTTERDAM, and bound for San Francisco (Cal.)

D G H Co. 2023 (two thousand twenty three) Sheets.

Kos 315.210

“For transit wholly or part”

being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition, at the aforesaid port of San Francisco (Cal.) unto Order or his or their assigns. Average as per York-Antwerp Rules 1890. Freight for the said Goods and primage together, to be paid on delivery, as per endorsement, in cash, without deduction, at the exchange of \$4.85 per pound sterling.

Consignees to pay double freight on all weight found over and above the weight entered on this Bill of Lading, and also any extra expenses incurred in connection with weighing, should the weight be found on landing to be in excess of that entered in Bill of Lading.

The following are the exceptions and stipulations referred to: The act of God, the King's Enemies, loss or damage from fire on board, in hulk, or craft,

or one shore, arrest and/or restraint of Princes, Rulers and People, Collision, any act, neglect, or default wathsoever of Pilot, Master or Crew in the Management or Navigation of the Ship, and all and every danger and accidents of [16] the Seas, Canals, and Rivers, and of navigation of whatever nature or kind always mutually excepted. The vessel to have liberty to call at any ports in any order, to sail without pilots and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

The Ship is not liable for leakage, breakage, loss or damage by heat, sweat, rust, or decay, unless occasioned by improper stowage.

The Ship will not be liable for gold, silver, bullion, specie, jewellery, precious stones, or precious metals, unless Bills of Lading are signed for such goods, and the value declared therein.

If goods of a dangerous nature are shipped without being previously arranged for, they are liable to be thrown overboard, and their loss as well as any loss or damage to the Ship or cargo will fall upon the Shippers or Owners of such goods.

The Master is to deliver the Goods with all reasonable despatch; and the consignees are to be ready to receive them within forty-eight hours after the Ship commences to unload, otherwise the Master or Agent may discharge and store them at the expense and risk of the Owners of the Goods.

IN WITNESS WHEREOF, the Master, Owner, or Agent of the said Ship, has signed three Bills of Lading, exclusive of the Master's copy, all of this

tenor and date, one of which being accomplished, the others to stand void.

Weight, measure and contents, unknown.

Dated, in ~~Antwerp~~ 19th February, 1910.

Rotterdam

J. B.

JOHN BAXTER,

Master. [17]

P. Pon JOHN P. BEST & CO.

N. W. MENDENTHAL.

[Endorsed]: Filed Sep. 12, 1910. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [18]

*In the District Court of the United States of
America, Northern District of California.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY (a Corp.),

Libellant,

vs.

The British Bark "DOLBADARN CASTLE," etc.,
Respondent.

Claim.

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States, for the
Northern District of California:

The claim of Dolbadarn Castle Ship Company,
Limited, to the British Bark "Dolbadarn Castle,"
her tackle, apparel and furniture, now in the cus-
tody of the Marshal of the United States for the said
Northern District of California, at the suit of Par-

rott & Company, a corporation, alleges:

That the said company, Dolbadarn Castle Ship Company, Limited, is the true and *bona fide* owner— of the said British Bark “Dolbadarn Castle,” her tackle, apparel and furniture, and that no other person is owner thereof.

Wherefore, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to said claimant and otherwise right and justice to administer in the premises.

JOHN BAXTER. [19]

JOHN BAXTER deposes and says that he was and is the master of said vessel, and that at the time of the said arrest thereof he was in possession of the same as the lawful bailee thereof for the said owner,— and that the said owner— resides out of the said Northern District of California, and more than one hundred miles from the city of San Francisco, in said District.

Northern District of California,—ss.

Subscribed and sworn to before me this 14th day of September, A. D. 1910.

[Seal]

FRANCIS KRULL,

Deputy Clerk U. S. District Court, Northern District of California.

IRA S. LILLICK,

Proctor for Claimant.

[Endorsed]: Filed Sep. 14, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [20]

UNITED STATES OF AMERICA.

*In the District Court of the United States for the
Northern District of California.*

IN ADMIRALTY.

PARROTT & COMPANY, a Corporation,

Libelant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,

Respondent.

THE DOLBADARN CASTLE SHIPPING COM-
PANY, LIMITED, a Corporation,

Claimant.

Answer and Interrogatories.

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States for the
Northern District of California:

The answer of the Dolbadarn Castle Shipping
Company, Limited, a corporation, owner and claim-
ant of the British Bark "Dolbadarn Castle," her
tackle, apparel and furniture, to the libel of Par-
rott & Company, a corporation, respectfully shows
as follows:

I.

Answering unto the first article in said libel the
claimant admits the same. [21]

II.

Answering unto the second article in said libel,
the claimant admits the same, save as hereinafter
specifically denied and with the exception that, under

the contracts of affreightment or bills of lading mentioned in Article II of said libel, the goods therein referred to were, under the terms of the said contracts of affreightment or bills of lading, to be delivered in like good order and condition at the Port of San Francisco, as when received, the act of God, the neglect and default of pilot, master or crew in the navigation of the ship and all and every the dangers and accidents of the seas, rivers and navigation of whatever nature or kind excepted.

And under the said contracts of affreightment or bills of lading it was agreed that the ship would not be liable for leakage, breakage, loss or damage by heat, sweat, rust or decay unless occasioned by improper storage.

Further answering said article of said libel the claimant alleges that it is informed and believes, and upon such information and belief alleges, that the 2,023 steel plates referred to in said article of said libel were received by claimant on board said vessel on or about the 19th day of February, 1910, at the Port of Rotterdam, but that when so received the said plates, or a portion thereof, were in a more or less rusty condition.

III.

Answering unto the third article in said libel, the claimant admits that when the barrels of cement therein referred to were delivered at the Port of San Francisco, they were not in the same good order and condition in which they had been received, and that the damage caused to the said barrels of cement, as well [22] as to a part or portion of said steel

plates, was caused to the same while the said cement and the said steel plates were on board and in the custody of said bark; but claimant denies that the same or any part thereof were damaged by reason of the want of care of the master or owners of said bark, either in the stowage or transportation or handling of said merchandise.

IV.

The claimant avers that the loss and damage referred to in said libel were caused solely and entirely by the force of the winds and waves and perils of the sea; which, notwithstanding that the said bark had been and was up to that time in all respects seaworthy and properly stowed, so injured and strained her that the sea water during a long season of tempests and gales was forced through her decks into and upon the cargo referred to, wetting and damaging the same; that the master and crew of said vessel took every precaution for the protection of said cargo, and that the damage thereto was caused by the act of God and without fault on their part or insufficiency on the part of said vessel.

V.

Answering unto the fourth article in said libel, the claimant admits that the master, owners and agents of said bark have been requested to pay to libelant certain damages which libelant claims to have sustained by reason of said damage to said merchandise, and that claimant has failed and refused to pay libelant therefor; as to the allegation in said article that the damage on said steel plates amounts approximately to the sum of One Thousand Eight

Hundred Fifty Dollars (\$1850.00) and the damage to the cement approximately to the sum of One Hundred Twelve and 80/100 Dollars (\$112.80), the claimant has no information with regard [23] to the amount of said damage, wherefore claimant calls for proof thereof.

VI.

Answering unto the fifth article in said libel, the claimant admits the jurisdiction of this court, but denies that all and singular the premises of said libel are true except as the same are hereinbefore specially admitted.

WHEREFORE, the claimant prays that the said libel be dismissed and for its costs.

THE DOLBADARN CASTLE SHIPPING
COMPANY, LIMITED.

By IRA S. LILLICK.

IRA S. LILLICK,

Proctor for Claimant. [24]

United States of America,
Northern District of California,—ss.

Ira S. Lillick, being first duly sworn, deposes and says: That the claimant in the above-entitled cause is absent from this District and resides more than One Thousand (1,000) miles therefrom, and that deponent is authorized to act for it herein, and he is the agent for claimant for the purpose of defending any cause of action stated in the libel on file herein; that the foregoing answer is true according to his information and belief, that the source of deponent's knowledge is information derived from the agents of the claimant and documents which he has seen;

and that deponent verily believes said information is true.

IRA S. LILLICK.

Subscribed and sworn to before me this 3d day of November, 1910.

[Seal]

CEDA DE ZALDO,

Notary Public in and for the City and County of San Francisco, California. [25]

[Interrogatories Propounded to Libelant.]

Interrogatories propounded to the libelant, which it is required to answer in writing, under oath.

First Interrogatory:

When the steel plates, referred to in the libel herein, were delivered to the "Dolbadarn Castle" for shipment at Rotterdam, were they not in a more or less rusted condition?

Second Interrogatory:

Did the mate of the "Dobadarn Castle" deliver to the consignor of said steel plates a receipt for said steel plates in addition to Bills of Lading?

Third Interrogatory:

If your answer to the Second Interrogatory be in the affirmative, attach to your answers to the foregoing interrogatories a copy of said receipt.

San Francisco, November 3d, 1910.

IRA S. LILLICK,

Proctor for Claimant.

Due service and receipt of a copy of the within answer and Interrogatories is hereby admitted this 3d day of November, 1910.

ANDROS & HENGSTLER,

Proctors for Libelant.

[Endorsed]: Filed Nov. 4, 1910. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [26]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 15,073.

PARROTT & COMPANY, a Corporation,
Libelant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

Exceptions to Answers and Interrogatories.

To the Honorable JOHN J. DE HAVEN, Judge of
the Above-entitled Court:

FIRST: The Exceptions of Parrott & Co., libel-
ant, to the Answer of the claimant herein allege:

That the following part of said Answer is irrele-
vant and impertinent, to wit: All that part thereof
beginning on page 2, line 16, with the words: "Fur-
ther answering," and continuing to the end of Arti-
cle II of said Answer. The allegations contained in
the part specified constitute no defence to the libel,
being an attempt to vary and contradict the written
Bills of Lading set forth in the Libel and admitted
by the Answer to be the contract between the par-
ties hereto.

SECOND: The Exceptions of Libelant to the
Interrogatories propounded to the libelant allege
that said Interrogatories are irrelevant and imperti-

nent, and, on the face thereof, purport to elicit facts which would be incompetent, irrelevant and immaterial under the issues and pleadings, and which facts, assuming them to be true, would vary and contradict the express terms of the written contract between the parties hereto.

WHEREFORE libelant prays that the part of the Answer above specified, together with the said Interrogatories, be struck from said Answer.

ANDROS & HENGSTLER,

Proctors for Libelant. [27]

Due service and receipt of a copy of the within Exceptions to Answer is hereby admitted this 12th day of December, 1910.

IRA S. LILLICK,

Proctor for Respondent.

[Endorsed]: Filed Dec. 13, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [28]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 5th day of June, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

#15,073.

PARROTT & CO.

vs.

Br. Ship "DOLBADARN," etc.

Order Submitting Cause as to Exceptions to Answer.

The exceptions to the Answer herein this day came on for hearing, L. T. Hengstler, Esqr., appearing for respondent and Ira S. Lillick, Esqr., appearing for libelant, and after hearing proctors, by the Court ordered that said exceptions be, and they are hereby, submitted to the Court for decision upon the points and authorities cited. [29]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 8th day of June, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

#15,073.

PARROTT & CO.

vs.

The Br. Brk. "DOLBADARN," etc.

Order Overruling Exceptions to Answer, etc.

The exceptions to the answer and interrogatories propounded by respondent, having been heretofore submitted to the Court for decision, now after due consideration had thereon, by the Court ordered that said exceptions be, and the same are hereby overruled. [30]

*In the District Court of the United States, for the
Northern District of California.*

PARROTT & CO., a Corporation,

Libelant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,

Respondent.

**Exceptions to the Answers of Libelant to the Inter-
rogatories Proposed to It.**

First: The claimant excepts to the answers to the first interrogatory for the reason that instead of answering the interrogatory fully, directly and positively, it purports to answer it by stating that it has no knowledge or information concerning it, and said answer is insufficient.

Second: That claimant excepts to the answer to the second interrogatory for the reason that the said answer is insufficient in that it simply states that the libelant has no knowledge respecting the subject matter of said interrogatory.

WHEREFORE, claimant prays that the libel be dismissed and that claimant have judgment herein for its costs or for such other relief herein as to this Honorable Court shall seem meet and proper.

Dated: December 29th, 1911.

IRA S. LILLICK,
Proctor for Claimant.

Due service and receipt of a copy of the within

exceptions, etc., is hereby admitted this 29th day of December, 1911.

ANDROS & HENGSTLER,
Attorney for Libelant.

[Endorsed]: Filed Dec. 30, 1911, at 11 o'clock and
— min. A. M. Jas. P. Brown, Clerk. By Francis
Krull, Deputy Clerk. [31]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 27th day of January, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

#15,073.

PARROTT & CO.

vs.

Bk. "DOLBADARN CASTLE," etc.

**Order Submitting Cause as to Exceptions to
Answers to Interrogatories.**

The exceptions to the answers to the Interrogatories this day came on for hearing. Ira S. Lillick, Esqr., appearing for and Mr. Bell opposing said exceptions. After hearing proctors by the Court ordered that said exceptions stand submitted to the Court for determination. [32]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 3d day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

#15,073.

PARROTT & CO.

vs.

The Brk. "DOLBADARN," etc.

Order Overruling Exceptions to Answers to Interrogatories.

The exceptions to the answers to the interrogatories proposed by claimant herein, having been heretofore submitted to the Court for determination, now after due consideration had thereon, by the Court ordered that said exceptions be, and the same are hereby overruled. [33]

[Minutes—Hearing—November 18, 1913.]

At a stated term of the District Court of the United States for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 18th day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,073.

PARROTT & CO.

VS.

The Br. Bark "DOLBADARN CASTLE," etc.

This cause this day came on for hearing, L. T. Hengstler, Esqr., appearing for libelant and Ira S. Lillick, Esqr., appearing for claimant. On motion of L. T. Hengstler, libelant allowed to amend libel as to extent of damage and consignee of cargo. Mr. Hengstler then stated the case and Mr. Lillick called W. H. Stewart, John A. Bishop, Thoas. Wallace, Raphael Lopez, and F. W. Mills, who were each duly sworn and examined for claimant. Mr. Hengstler called Alfred F. Pillsbury, Franklin Riffe, Bernard Hilbing, who were each sworn and examined for libelant. Claimant introduced in evidence a certain exhibit, which was marked Claimant's Exhibit #1. The further hearing was then continued until tomorrow at 9 o'clock A. M. [34]

[Minutes—Hearing (Resumed) November 19, 1913.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 19th day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,073.

PARROTT & CO.

vs.

The Br. Bark "DOLBADARN," etc.

The further hearing of this cause was this day resumed. Mr. Hengstler called Frederick G. Wilson, G. Loken, who were each duly sworn and examined on behalf of claimant. Mr. Lillick called H. L. E. Meyer, Jr., who was duly sworn and examined for claimant. Further hearing continued until to-morrow at 9 o'clock, A. M. [35]

**[Minutes—Hearing (Resumed) November 20,
1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 20th day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,073.

PARROTT & CO.

vs.

The Brk. "DOLBADARN CASTLE," etc.

The further hearing of this cause was this day resumed. Mr. Hengstler called P. W. Tomkins and H. L. Winckle, who were each duly sworn and exam-

ined for libellant. Mr. Lillick introduced in evidence depositions taken on behalf of claimant before a United States Commissioner. Further hearing continued until Nov. 22, 1913, at 9 o'clock, A. M. [36]

**[Minutes—Hearing (Resumed) and Submission—
November 22, 1913.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 22d day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,073.

PARROTT & CO.

vs.

The Brk. "DOLBADARN CASTLE," etc.

The further hearing of this cause was this day resumed. The cause was argued by respective counsel and submitted to the Court for decision upon points to be filed. [37]

[Order Dismissing Libel.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of January, in

the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#15,073.

PARROTT & CO.

vs.

The Brk. "DOLBADARN CASTLE," etc.

This cause having been heretofore submitted to the Court for decision, now after due consideration had the Court files its written opinion, and by the Court ordered that the libel herein be, and the same is hereby dismissed. [38]

In the District Court of the United States, in and for the Northern District of California, First Division.

MAURICE T. DOOLING, Judge.

PARROTT & COMPANY,

Libelant,

vs.

The British Ship "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

Testimony Taken in Open Court.

TUESDAY, NOVEMBER 18, 1913.

APPEARANCES:

L. T. HENGSTLER, Esq., for Libellant.

IRA S. LILLICK, Esq., for Respondent.

[Statement of Case by Mr. Hengstler.]

Mr. HENGSTLER.—If it please the Court, this is a case of damage to cargo carried to this port from Rotterdam in December, 1910, in the British ship “Dolbadarn Castle.” At the time when the libel was filed, the damages as then ascertained were stated to be a certain number of barrels of cement, 50 barrels of cement; afterwards, and in the course of time it was ascertained that a considerable number of other barrels were found damaged; the damage was not ascertained until the cement was sold to buyers, and for that reason I desire to move an amendment to the libel amending the word “fifty” in the libel to the word “four hundred” barrels of cement. I understand that your Honor will follow the usual practice of *referred* the damages to the Commissioner. We will show that the cargo whilst damaged here, and that the claimant is liable in the number of barrels to be shown as damaged, I understand, is a matter for the Commissioner to ascertain on reference [39] for the ascertainment of the damages.

The COURT.—Yes.

Mr. HENGSTLER.—The motion to amend is granted?

Mr. LILLICK.—I want to put in an objection, your Honor, that we are not here on the pleadings on the remaining barrels and it is borne out by the number of barrels alleged to have been damaged in the libel, that the tops of 50 barrels of cement were damaged, and our explanation is, as we will present evidence to your Honor, that was caused by the ship having gone through a storm and water leaked in; the only objection is this, it is taking me by surprise, and my proof is as to that.

Mr. HENGSTLER.—You do not claim that the tops of 50 barrels or 150 barrels were damaged?

Mr. LILLICK.—That is true. I am only putting in my objection to explain the situation I am in in reference to the changed libel.

The COURT.—It is not claimed that the other cement that you have found damaged since the filing of the libel was damaged by any other cause or for any other reason than the other?

Mr. HENGSTLER.—No; we claim the damage was exactly the same damage.

The COURT.—So far as the cause of injury is concerned, the testimony concerning 50 or 400 would be the same.

Mr. HENGSTLER.—Exactly the same. We will show the cause of the damage was one cause that effected all the damage.

The COURT.—The amendment will be permitted.

Mr. HENGSTLER.—Now, if your Honor please, I do not think it is necessary to present the case to the Court to read the libel.

The COURT.—I read the libel this morning, and

I did not quite see what connected the libelant with the transaction. There may be some allegation or some averment in there. It is averred that— [40]

Mr. HENGSTLER.—(Intg.) That the libelant is the consignee.

The COURT.—Is that averred anywhere?

Mr. HENGSTLER.—It is intended to be averred. I thought it was. I will read it.

The COURT.—I do not notice any such averment. It may be there.

Mr. HENGSTLER.—It seems that there is no express averment; in article 3 of the libel your Honor will notice that there is stated that the cargo was tendered to the libelant or order in a damaged condition.

The COURT.—That is true.

Mr. HENGSTLER.—As a matter of fact, it should appear more clearly that the libelant in this case is the consignee of the cargo. If your Honor will allow me an amendment to that effect—

The COURT.—I thought the matter has proceeded thus far apparently on the theory that it was fully stated. I think perhaps you had better amend and make it clear.

Mr. HENGSTLER.—I thought that was understood.

Mr. LILLICK.—We have no objection. That is a fact.

Mr. HENGSTLER.—It is perhaps true that in our admiralty pleadings we have been a little negligent in the past, because it has always been the practice not to take any technical objection with refer-

ence to matters of that sort; and it may be that this is one of the libels that has been handed down from generation to generation here in this port. I suspect it is.

Now, the cargo in this case that was damaged consisted of two elements; one of the shipments of cargo was cement in barrels. The libel alleges that there were 2,775 barrels of cement. The other shipment is a shipment of steel plates or sheets, as they [41] are called in the bill of lading, 2,023 sheets. That, if your Honor please, is admitted. Bills of lading are attached to the libel as exhibits and they show that the cargo was shipped in good order and condition, both the cement cargo and the plates in question, in good order and condition. Then the libel states that a breach of contract that the cargo arrived in this port in bad condition, damaged. The answer admits the damage in article 3, which states that, answering unto the third article in said libel, the claimant admits that when the barrels of cement therein referred to were delivered at the Port of San Francisco they were not in the same good order and condition in which they had been received, and that the damage caused to the said barrels of cement, as well as to a part or portion of said steel plates, was caused to the same while the said cement and said steel plates were on board and in the custody of said bark. These damages, therefore, are admitted. Now, the libel alleges that a certain number of these barrels of cement were damaged and that 185 tons out of the 2,023 sheets also were damaged; a part, therefore, of the sheets of the steel plates was damaged. It is libelant's contention that this damage was caused by

negligence in the stowage and transportation and handling of these goods, as the libel shows. More specifically we intend to show to your Honor that the damage was caused by coke sweat in connection with insufficient ventilation in the ship. We will show to your Honor that the vessel was filled up very largely with a cargo of coke; that in the forward part and after part of the vessel there was stowed coke in bulk, and that only the middle portion of the vessel contained what is called general merchandise, including this cement and the steel plates. The general merchandise was bulkheaded off on both sides from the coke. We intend to show to your Honor that the damage was caused [42] by the sweat of the coke. It is a notorious fact that coke is dangerous merchandise to ship in a vessel, and that the proper stowage of that kind of cargo makes it necessary to use extra precautions, to bulkhead it off from general merchandise, which is likely to be damaged by the coke sweat, by an air-tight, by a sweat-tight bulkhead. That was not done in this case, and the damage, we claim, arose by reason of the sweat of the coke that permeated the entire vessel, and that produced the damage in the cement by caking it, and the damage on the steel plates by pitting them, making not merely superficial rust upon these steel plates, but little holes; it ate little holes into them, so as to make these steel plates useless for the commercial purposes for which they are used. We will show to your Honor that these steel plates are particularly sensitive and require particularly careful stowage.

Now, the contention on the other side is—

Mr. LILLICK.—Do you mind my stating it?

Mr. HENGSTLER.—I am merely stating it from the pleadings, as far as the answer is concerned; I am not going into details. The answer pleads that this damage was caused by the force of winds and waves and perils of the sea, by sea water entering and damaging the cargo and forced through the decks, and without any fault on the part of the master and the crew. That, I think, is the case.

Now, a very similar case was tried in this court a year or so ago, and I think it would be proper as part of the statement of the facts in this case to refer your Honor to it at the present time, because I think it raised exactly the same questions with reference to the precautions necessary to the stowage of this kind of merchandise. If there is no objection I would like to call your Honor's attention to it at this stage; I do not [43] want it to appear as argument, because it happens to be recorded in a law book. It is a statement of the facts in the "Jean Bart" case, and I think it will help your Honor in seeing the issues that are involved in the transaction. I will call your Honor's attention to it at this time. The case I refer to is the case of "Jean Bart"—

Mr. LILLICK.—If that be done, I want, of course, to have before the Court all the facts in this case; but if it be in the nature of an argument, of course that can be properly taken up at that time. I do not want to hurry this case along unnecessarily by anything of that sort; it would simply mean a repetition, I think, later of your statement of what the facts are in the "Jean Bart" case, in the way of argument

touching on that question.

Mr. HENGSTLER.—I do not intend to make any argument at the present time. I know that will not be proper. I simply offer the statement of facts as exactly analogous in showing the nature of this kind of cargo in connection with coke, and instead of showing it in my own words and elaborating on it in my own words, I can give it simply using the words of Judge Dietrich in that case. However, I can leave it to your Honor to read it. I refer to it particularly, that part of the case on page 1,003, beginning with the paragraph marked “1,” down to page 1,004, the 3d paragraph.

The COURT.—What is the volume?

Mr. HENGSTLER.—The volume is 197 of the Federal Reporter. It is a case that was tried in this court and decided by Judge Dietrich, nearly two years ago.

Now, if your Honor please, in view of the admissions in the answer in article 3 that the damage happened in the vessel, we have made out a *prima facie* case under the law, because the principle of law is well settled that when goods are damaged [44] while in the possession of a ship there is a *prima facie* presumption that the injury was caused by the fault of the ship rather than by perils of the sea. I would refer your Honor with reference to that principle to the 36 Volume of CYC., on page 267. On that page, in Note 50, your Honor will find a great many authorities, long series of authorities cited to that principle, about which there can be no doubt. It appears that the goods were damaged in this ship and

it is admitted that they were damaged in the ship, and while they were in the possession of the ship. That raises a *prima facie* presumption in our favor, and the burden of proof is now upon the ship to prove by a preponderance of evidence that the injury was caused by perils of the sea.

Mr. LILLICK.—If your Honor please, our defense in the action will be based, first, and primarily, upon the fact that there was a charter-party entered into between the owner of the ship and Parrott & Company, the libelant in this case, and that the damage that was done to this cargo was a damage that arose wholly and alone by reason of a peril of the sea, a storm or two storms through which this vessel passed, of such severity, that the deck seams opened at the mast and allowed salt water to leak down upon this cargo, and under all of the authorities upon that point, the burden of proof of this *prima facie* case, which Mr. Hengstler has just spoken of, and Mr. Hengstler will agree with me about that, after we prove to your Honor's satisfaction that this damage was caused by salt water or by water that subsequently, by reason of the evaporation of this salt water, caused the pitting of this steel and the damage to this cement, then and thereupon the burden of proof shifts back upon the libelant to prove that that damage was not by the storm. That is correct, is it not, Mr. Hengstler? [45]

Mr. HENGSTLER.—Proceed with that proof first.

Mr. LILLICK.—I think you and I are practically agreed upon the law in the case. Secondly, if your

Honor please, the charter-party was supplemented by bills of lading in which bills of lading were provisions exempting the vessel from liability of rust, sweat, and certain other exemptions unless due to improper stowage. The charter-party itself between the owners of the vessel, and Parrott & Company, had a provision in it under which the stevedore was to be appointed by the charterers, which will mean a point upon our side that this vessel was stowed under the direction and supervision of an agent of Parrott & Company itself. Another provision of the charter-party was that the owners were to furnish a certificate from a competent surveyor as to the seaworthiness of the vessel and her ability to carry cargo.

Mr. HENGSTLER.—On that point, you do not deny that the ship and captain are solely responsible for stowage, do you?

Mr. LILLICK.—Not entirely, Mr. Hengstler, but with this qualification, where the stevedore who has loaded the vessel is a stevedore appointed by the charter, it makes a difference as to whether or not the charter-party provides for this stevedore as an agent of the charterer rather than to have the master upon his own responsibility and using his own judgment stow the cargo; in other words, that the burden of proof put upon us is not so great where the stevedore appointed by the charterer is present acting for the consignee of the cargo.

Mr. HENGSTLER.—You admit that the testimony of your captain is very express on the point

that he and he alone was responsible for the stowage of the vessel.

Mr. LILLICK.—I don't recall that, Mr. Hengstler, exactly, but it is the testimony of the captain that the vessel was stowed [46] properly, and then carrying out his testimony, the other members of the crew, the officers of the vessel—

The COURT.—(Intg.) If the vessel was stowed properly it would not make much difference who stowed it, would it?

Mr. LILLICK.—No, it would not, and we propose to show it was properly stowed. I think that is all. As I understand, Mr. Hengstler, you propose that I put in my case before yours. The order of proof will make no difference because in the long run the court, of course, will have to make up its mind whether we have shown that these damages were caused by a peril of the sea or whether they were a result of what you claim, sweat.

Mr. HENGSTLER.—I think it does make a difference. Our position under the pleadings is we rest with our *prima facie* case.

Mr. LILLICK.—That makes no difference, so I will proceed to read the depositions of the officers of the vessel. I am sorry to take up your Honor's time in reading the depositions, but it is absolutely necessary in order to argue the case as Mr. Hengstler and I both desire to do orally, we have to read this testimony because it is so interlocked with other testimony in the case that it would be necessary to hear it. The first witness is John Baxter, if your Honor please, on page 3.

Mr. HENGSTLER.—If your Honor please, there are witnesses here who are business men. The reading of this testimony will probably consume two hours. Would it be proper that the witnesses be excused until to-morrow morning, because then we will be through with this part of it?

The COURT.—Why bring the witnesses back to-morrow morning when you have them here to-day? These things are always here.

Mr. HENGSTLER.—I have no objection. If you will call your witnesses then I will call my witnesses.
[47]

Mr. LILLICK.—I think unquestionably you will agree with me that the log of the vessel shows that she went through severe storms. After showing that I could rest so far as my side of the case was concerned, and the burden would be upon you to prove that the stowage was improper. Now, the witnesses that I have here are witnesses to rebut whatever testimony you might put in with respect to that improper stowage.

Mr. HENGSTLER.—I do not think that that is correct, that if you succeeded in showing there were storms, that would shift the burden of proof.

Mr. LILLICK.—You and I disagree.

Mr. HENGSTLER.—I could not agree on that.

The COURT.—It seems to me, gentlemen, that you might state generally what your depositions show, without reading them at this time, and the Court can read the depositions afterwards.

Mr. LILLICK.—Then I will put my witnesses on the stand at this point, without any question as to

where the burden of proof is, and I will read the depositions to your Honor later before we argue the case.

The COURT.—You can assume that the depositions being of some force, instead of being read from the rostrum, the Court can read the depositions, and the Court will read them before the argument. There are certain hours that we can put in in court. Now, to-morrow I have a case on with a jury coming in, and I do not think we ought to take two hours of our court time in reading depositions.

Mr. LILLICK.—Then the case will be continued until after your Honor has read the depositions for argument?

The COURT.—Yes; if you desire to argue it orally some future day will be fixed and the Court will meanwhile read the depositions.

Mr. LILLICK.—I will waive any point as to the proposition of [48] burden of proof being on me, and will call my witnesses.

[Testimony of W. H. Stewart, for Respondent.]

W. H. STEWART, called for respondent, sworn.

Mr. LILLICK.—Q. What is your occupation, Mr. Stewart? A. Surveyor for Lloyd's Register.

Q. How long have you been surveyor for Lloyd's Register? A. About 12 years.

Q. What is your duty with reference to examining cargoes as an agent of Lloyd's Register?

A. I examine simply when I am called in in special cases to do so.

Q. Were you called in upon an occasion about three years ago, 1910, to examine certain steel plates

(Testimony of W. H. Stewart.)

that were a part of the cargo of the "Dolbardan Castle"? A. I was.

Q. What did your examination of those steel plates result in with respect to your opinion as to the cause of the damage?

A. My examination of the steel plates convinced me that the pitting and deterioration was in a large measure due to salt water.

Mr. LILLICK.—Take the witness.

Cross-examination.

Mr. HENGSTLER.—Q. What examination did you make, Captain Stewart?

A. I made the usual examination, test, such as is made in those cases.

Q. What is that examination?

A. Well, the examination of the damages material and testing with nitrate of silver in the usual way.

Q. With nitrate of silver? A. Yes.

Q. What reaction did you get?

A. It gave the reaction that is usually given by salt.

Q. What is that reaction?

A. A sort of milky reaction. [49]

Q. How long have you been surveying cargoes, Captain? A. Off and on for about 12 years.

Q. In what part of the world?

A. San Francisco.

Q. How long have you been Lloyd's Surveyor?

A. 12 years.

Q. Have you ever examined damaged steel plates before? A. Yes.

(Testimony of W. H. Stewart.)

Q. Do you know the nature of steel plates?

A. Yes.

Q. Are they susceptible to outside influences or not, in your experience?

A. They are susceptible to water moisture and other chemicals of course.

Q. Subject to moisture; any kind of moisture, or particular kinds of moisture?

A. Well, some forms of moisture affect them of course more readily than others.

Q. Are they more sensitive than other kinds of steel or less sensitive than other kinds of steel? Take, for instance, steel bars; are they sensitive to outside influences? A. I don't think so.

Q. You don't know, do you?

A. It depends a good deal on the composition of the steel, the nature of the steel itself.

Q. What kind of steel was this that you examined?

A. Ordinary steel plates, metal plates.

Q. Ordinary steel plates. Did you know what the purpose of these steel plates was?

A. Just for ordinary purposes, I believe, for tanks, etc.

Q. Are all steel plates alike or was this a particular kind of steel plate?

A. Well, so far as I know, they were ordinary steel plates.

Q. But you don't know, do you?

A. I don't know definitely the composition of the plates; no.

Q. How thick were these plates, Captain?

(Testimony of W. H. Stewart.)

A. The thickness varied, so far as I remember.

[50]

Q. To what extent?

A. I could not tell you the extremes. As far as I remember, they ran from about $\frac{1}{4}$ of an inch to perhaps $\frac{3}{8}$, and possibly thinner than that; I don't remember exactly.

Q. They were very thin steel plates, were they, so far as you remember? A. Not very thin; no.

Q. But from $\frac{1}{4}$ of an inch to $\frac{3}{8}$ of an inch is your recollection? A. As far as I remember, yes.

Q. You are not an expert on steel, are you, Captain? A. Well, no, not exactly.

Q. You are not an expert on this kind of steel plates, are you?

A. In what way, an expert in what way?

Q. What experience have you had with that kind of steel plates?

A. Well, I have had considerable experience in having steel plates built into various kinds of structures, steel vessels, and the different parts of vessels.

Q. You know when it is a steel plate and you know when it is something else; that is about all, isn't it, Captain? A. Not exactly, no.

Q. You don't know how sensitive a steel plate is to the influence of a particular chemical or of the atmosphere, do you? A. No, not particularly.

Q. Do you know what agencies produce pitting in steel plates, Captain?

(Testimony of W. H. Stewart.)

A. A great many agencies produce pitting in steel plates.

Q. A great many agencies? A. Yes.

Q. Now, if you had used this test, this salt-water test that you mentioned of nitrate of silver on anything that comes out of the ship you would have got some reaction, would you not?

A. Not necessarily.

Q. Isn't it a fact, Captain, that everything that comes out of the hold of a ship shows that same reaction? A. No. [51]

Q. Does it not necessarily contain some salt?

A. I never found it so.

Q. Isn't it a fact that there is a great deal of salt in the very air, Captain, everywhere, here in San Francisco and everywhere, so that if you used that nitrate of silver on most anything you would get some reaction of the kind that you have described; isn't that a fact?

A. I have used it very frequently without having any reaction. This is the ordinary application of it.

Q. Did you ever use it when you got the reaction, when you came to the conclusion that the cause of the reaction was something outside of salt water?

A. No, I do not believe I have.

Q. But you are not a chemist, are you, Captain?

A. No, I am not.

Q. You don't know anything about it, this is just a popular test? A. It is a usual, every-day test.

Q. You don't think, Captain, that there is enough salt in a vessel, a vessel that has been floating on

(Testimony of W. H. Stewart.)

the ocean for 5 or 6 months, and has been coming from Rotterdam to San Francisco, enough salt on everything that comes out of the hold of that vessel to show some reaction? A. No, I don't.

Q. You don't think so?

A. No, not as applied to it, visible to the naked eye. It may be that on a minute chemical examination there might be traces of salt on it.

Redirect Examination.

Mr. LILLICK.—Q. What did this examination of yours show with reference to salt, as to a slight reaction or a decided reaction?

A. Well, it showed sufficiently plain to convince me that there was salt contained on the material.

[52]

Q. By speaking of the test as a popular test, what was that test with reference to the usual and customary test made by marine surveyors to determine the reason for the rust or pitting?

A. Simply applying a few drops of nitrate of silver to the parts which we tested.

Q. Is that the usual and customary test applied by marine surveyors? A. Yes.

Q. One of the agencies of pitting is salt, is it not, Mr. Stewart?

A. That frequently causes pitting, yes.

Q. Was there any question in your mind as to the cause of the pitting on this steel at the time you made your test? A. No.

Recross-examination.

Mr. HENGSTLER.—Q. Where did you make this

(Testimony of W. H. Stewart.)

test, where were those steel plates?

A. In the warehouse of Dunham, Carrigan & Hayden.

Q. How far away is that from the place the "Dolbardan Castle" discharged, from the pier?

A. The warehouse is at 6th or 7th or 8th Street, probably 2 miles away.

Q. When did you make that investigation?

A. On the 30th of September, 1910.

Q. Do you know when this cargo arrived here in port? A. No, I do not.

Q. You don't know whether it arrived in August or July, do you?

A. Well, I don't know of my personal knowledge anything about that.

Q. You know that there are other agencies that produce pitting this salt water, don't you, Captain?

A. Yes.

Mr. HENGSTLER.—That is all.

Mr. LILLICK.—That is all. [53]

[Testimony of John A. Bishop, for Respondent.]

JOHN A. BISHOP, called for the respondent, sworn.

Mr. LILLICK.—Q. Mr. Bishop, what is your occupation? A. Average adjuster.

Q. How long have you been an average adjuster?

A. Since 1902 in San Francisco.

Q. And elsewhere? A. Liverpool, England.

Q. What, if any, experience have you had with reference to examining cargoes of vessels?

A. Since 1902 in San Francisco I have frequently

(Testimony of John A. Bishop.)

examined cargoes.

Q. In these examinations have you had occasion to look at steel plates or other general cargo arriving in vessels to determine whether or not it was damaged by salt? A. On frequent occasions.

Q. What would you say as to the reaction from a salt test with reference to any cargo coming on a vessel?

A. It depends somewhat on the nature of the goods; on the nature of the article; on some articles there is a very marked reaction for salt; on the iron hoops of barrels, for instance, or iron, you will frequently find a very marked reaction.

Q. And where that marked reaction comes what is the usual reason for it?

A. I don't quite understand the question.

Q. Where that marked reaction of salt occurs on barrels, or hoops of barrels in the cargo of vessels, what is the reason for the salt deposits on the barrels or on the hoops?

A. Well, I would say that salt water has lodged on the hoops or on the article and the water having evaporated has left the salt.

Q. Now, Mr. Bishop, with reference to the general type of the vessel and the point testified to a few minutes ago about some cargo not having any traces of reaction of salt, what do you say of that? [54]

A. That is very frequently the case. We frequently examine cargo to determine whether or not there is any salt-water damage, and frequently find no traces of salt at all.

(Testimony of John A. Bishop.)

Q. Upon whose request did Mr. Stewart examine the steel plates? A. At my request.

Q. Why?

A. I was notified that there would be a claim made against the vessel for this damage and I immediately instructed Mr. Stewart to examine the iron to determine its condition and the cause of the damage.

Q. Do you know when that examination was made, Mr. Bishop?

A. I think it was September or the beginning of October, 1910. I don't know the exact date.

The COURT.—Captain Stewart said September 30th. Is that date disputed?

Mr. LILLICK.—No, it is approximately correct, our Honor.

Mr. LILLICK.—That is all.

Cross-examination.

Mr. HENGSTLER.—Q. Was there a written report made by Captain Stewart of his examination to you, Mr. Bishop?

A. Not a written report, Mr. Hengstler; no.

Q. No writing at all?

A. There was no written report.

Q. But do you remember what the report was?

A. There was a verbal report to me which I immediately reported to our principals in London.

Q. And the verbal report was that the damage was due to what? A. Salt water.

Q. Was there anything mentioned in the verbal

(Testimony of John A. Bishop.)

report which he made to you about coke or coke sweat?

A. He was not called in connection [55] with the coke; he simply examined the steel plates and reported that the steel plates were damaged by salt water.

Q. Did he report that the steel plates were pitted?

A. He did.

Q. And reported that in his opinion the pitting was due to salt water? A. Due to salt water.

Q. You did not instruct him at the time to determine whether the damage was made by salt water or by sweat?

A. I asked him to determine the cause of the damage and he reported salt water.

Q. Mr. Bishop, you are not a chemist, are you?

A. I am not a chemist but I have studied chemistry.

Q. Would you call yourself an expert in chemistry, Mr. Bishop?

A. No, I would not call myself an expert.

Q. Would you call yourself an expert in stowing?

A. In stowing cargo.

Q. Yes.

A. I have had considerable experience on claims made for stowage of cargo.

Q. Just looked at the cargo after the claim was made; that is all, isn't it?

A. I am not a seaman. It is merely the experience that I gained in handling such cases, but not as a seaman.

(Testimony of John A. Bishop.)

Q. When you want to know something about damage to a cargo, you do not determine it for yourself, but you hire an expert, don't you?

A. We hire an expert and frequently go down with the expert and make an examination ourselves.

Q. Do you happen to know, Mr. Bishop, whether pitting of steel plates may be due to other causes besides salt water? A. Yes, it may be.

Q. If anybody dropped sulphuric acid on a steel plate, it would pit it, would it not? A. Yes.

Q. It would eat right through?

A. I would not say it would [56] eat through, but I would say it would cause pitting, sulphuric acid would cause pitting.

Q. And other agencies would cause pitting?

A. Sulphate of ammonia will cause pitting.

Q. Would coke sweat cause it, in so far as you know? A. I don't think so.

Q. You don't think so.

A. I have never heard of it.

Q. Have you ever heard of coke sweat doing damage to cargo in your experience?

A. Yes, I have under certain conditions.

Q. You have heard that very frequently, haven't you, Mr. Bishop?

A. Not more frequently than coming out in good condition.

Q. Now, Mr. Bishop, isn't it a fact that coke stowed in the hold of a vessel is a particular dangerous article, dangerous to general merchandise, and is recognized as such—isn't that a fact within

(Testimony of John A. Bishop.)

your own experience?

A. In our own experience it is an article which required care; yes, it does.

Q. It requires unusual care, does it not?

A. No more than other cargo of the same nature.

Q. That is true, but it requires more care than, for instance, chalk would, does it not?

A. Yes, I presume it would.

Q. It requires more care than substances that do not exude sweat to the same extent, does it not?

A. Yes, you have got to provide against sweat which is liable to arise in coke, but which does not necessarily arise from coke.

Q. Doesn't sweat necessarily arise from coke?

A. It does not necessarily arise from coke.

Q. But you know that sweat usually raises from coke, don't you, Mr. Bishop, in the holds of vessels?

A. No, I don't think so, Mr. Hengstler, not as strong as that. We have had a number of cases where damages has arisen from coke, numbers of cases, and we [57] have also had a number of cases of coke cargoes that have come out in perfect condition without any damage at all.

Q. It is undoubtedly the case in connection with merchandise with pig iron and things that would not be injured?

A. No, Mr. Hengstler, I am speaking of a cargo where the coke was laid on steel plates, and the steel plates came out in perfectly sound condition, where the coke was actually laid on steel plates.

Q. You have heard of such cargoes? A. Yes.

(Testimony of John A. Bishop.)

Q. Have you ever seen such cargoes, have you ever seen steel plates? A. I had it reported to me.

Q. But you never saw it?

A. I did not go down to the vessel myself.

Q. Did you believe it, and is it possible that coke laid upon steel plates, the steel plates came out in good condition?

A. Yes, I have every cause to believe it.

Q. I did not ask you whether you had had cause to believe it. I asked you whether you actually believed it? A. Yes, I actually do believe it.

Q. What relation has coke to moisture generally, Mr. Bishop?

A. Why it will absorb and give off moisture.

Q. Very freely, does it not? A. Yes.

Q. It is like a sponge, isn't it?

A. Pretty nearly so.

Q. As far as it absorbs moisture from the atmosphere, and will exude it again?

A. No, I don't think it will absorb moisture from the atmosphere, Mr. Hengstler.

Q. Or any moisture that happens to be around?

A. If it rains on it it will absorb moisture.

Q. Mr. Bishop, isn't coke when it is being manufactured, cooled off by water being poured on it when it is hot?

A. I believe it is, but I never had any personal experience, no knowledge of that. I have heard so.

[58]

Q. Mr. Bishop, do you know that there is an allowance for excess moisture of every coke cargo that

(Testimony of John A. Bishop.)

comes to San Francisco? A. Yes, a small amount.

Q. There is usually a contract by which a certain amount is allowed and everything in excess over that is deducted from the price of the coke, that is the custom, is it not? A. I believe it is.

Q. Isn't it also a fact that 3% is the usual allowance for the moisture in coke after its arrives here?

A. I could not say as to that, Mr. Hengstler.

Q. But you know it is something in that neighborhood?

A. I know there is a small percentage, but I don't know what the percentage is.

Q. You also know, don't you, Mr. Bishop, that sometimes the amount of water in the coke is over 10% when it comes out of a vessel?

A. Under extraordinary conditions; yes.

Redirect Examination.

Mr. LILLICK.—Q. You stated under cross-examination by Mr. Hengstler, Mr. Bishop, that you have had occasion to go down to examine cargoes with experts. Have you ever had occasion to go down to a cargo of a ship laden with general merchandise and coke prior to the arrival of the "Dolbardan Castle"?

A. Yes, we have had several cases of cargoes of cement and coke.

Q. Had you ever at any time prior to the arrival of the "Dolbardan Castle" ever seen a vessel having general cargo and coke combined where there were any particular precautions that were not taken upon the "Dolbardan Castle" to prevent sweat from the

(Testimony of John A. Bishop.)

coke reaching the general cargo?

Mr. HENGSTLER.—I object to that, if your Honor please; it does not appear that the witness knows anything about the precautions that were taken on the “Dolbardan Castle.” [59]

Mr. LILLICK.—I will ask Mr. Bishop whether he knows.

Q. Mr. Bishop, do you know how the cargo was stowed upon the “Dolbardan Castle”?

A. I did not see the stowage of the cargo myself, but I had reports from various sources as to how it was stowed.

Mr. HENGSTLER.—I object to it if the witness did not see it.

Mr. LILLICK.—Q. Mr. Bishop, if the cargo upon the “Dolbardan Castle” was stowed in such a manner that between the coke and the cement and these steel plates, a bulkhead was built, or bulkheads were built of boards, laid athwartships one upon the other, so that daylight could not be seen through them, and then upon that bulkhead of boards matting was laid, would you consider that kind of protection a sufficient protection to general cargo?

Mr. HENGSTLER.—He has said he is not an expert on stowage, if your Honor please, and I object to it.

Mr. LILLICK.—I will meet that objection.

Q. Mr. Bishop, in your experience as an average adjuster and your actual actions with respect to the examinations of cargoes, have you ever had occasion to make up your own mind whether or not a cargo

(Testimony of John A. Bishop.)

was properly stowed with reference to sweat from coke to a general cargo?

Mr. HENGSTLER.—I object to that, if your Honor please; the witness has already stated and admitted that he is not an expert on stowage; he is an average adjuster; if as an average adjuster he has made up his mind, that is evidently immaterial.

Mr. LILLICK.—Apparently we are at issue in respect to whether or not it is necessary that a man be an expert to judge whether a cargo is properly stowed to protect it from the sweat, by taking certain precautions. As Mr. Bishop is an average adjuster, [60] and with Mr. Bishop's experience as an average adjuster extending over 10 years, and his having been called, as he says, frequently to go down to vessels for the purpose of examining their cargo and see whether or not damage had been caused and the reason for that damage, he certainly is in a position to testify as to whether or not the damage is caused by sweat or whether or not a bulkhead is a sufficient bulkhead between the coke and general cargo.

Mr. HENGSTLER.—I think the question is entirely objectionable. The witness has not testified that he knows anything about the kind of bulkheads that are required for the purpose of stowing merchandise.

The COURT.—No, he has not.

Mr. LILLICK.—Then I will ask him.

Q. Do you know anything about the usual and customary way of stowing cargoes?

(Testimony of John A. Bishop.)

A. In the course of our business we have represented owners in probably 75 per cent of the cases of damaged cargoes coming to this port; a large number of those cases have been damaged due to carrying coke and general cargo. There were very serious claims in the year about 1908, 1909, so serious, that we decided to take it up with the various surveyors in the Port of San Francisco to determine whether or not coke and cement or general cargo could not be carried in the same ship without being damaged. I personally called a meeting of the various surveyors, and they recommended that bulkheads be built between coke and other general cargo. Those recommendations were forwarded by me personally to our representatives in London, who issued circular notices to all ship owners in Great Britain and France, and the result of that notice was that bulkheads were put up, and this ship, I think, was one of the first ships to sail after that time, [61] after receiving our notice and the recommendation which we had received from the surveyors in this port.

Q. What was the usual and customary manner of carrying coke and general cargo before this time?

A. Prior to that time, in a great majority of cases that came under our notice there were no bulkheads at all between the coke and the general cargo. There were merely sails or matting dividing the coke and the general cargo.

Recross-examination.

Mr. HENGSTLER.—Q. But it is a fact, is it not, Mr. Bishop that the largest part of damage cases

(Testimony of John A. Bishop.)

came from the fact that general cargo was carried in the ship in connection with coke; that is a fact, is it not?

A. That is a fact, without proper means being taken to divide them, separate them.

[Testimony of Thomas Wallace, for Respondent.]

THOMAS WALLACE, called for the respondent, sworn.

Mr. LILLICK.—Q. What is your occupation, Captain? A. Marine Surveyor and Port Warden.

Q. How long have you been Port Warden of the Port of San Francisco?

A. Four years last March.

Q. During the course of those 4 years how many vessels have you approximately examined, Captain?

A. Several hundred—I don't know exactly how many.

Q. Did you have occasion to examine the "Dolbardan Castle" when she arrived in August, 1910?

A. Yes.

Q. Do you remember the examination you made of that vessel with respect to her stowage, Captain?

A. Yes, I know something about [62] it. If you will let me look at my records that I made at the time, I have got them here—

Q. (Intg.) I have here, Captain, a certificate from you of an examination of the "Dolbardan Castle," which is an exhibit in the case, Respondent's Exhibit "H."

(Testimony of Thomas Wallace.)

A. This was made August 8, 1910; that is my signature.

Q. Captain, do you remember examining the bulkheads and the matting upon these bulkheads that separated the coke from the cement and the steel plates in that vessel? A. Yes.

Q. In your opinion, Captain, was that proper stowage? A. It was.

Q. The document you hold in your hand was issued by you, was it, Captain?

A. Yes. This was copied by the secretary. I gave my memorandum to the secretary and the secretary copied this from the memorandum. It is the same as is in the book.

Q. It is an official document issued from your office? A. Yes.

Q. Captain, do you remember examining the cement that was stowed upon that vessel?

A. Yes.

Q. Do you remember the upper tiers of the barrels that were in the hold of the vessel?

A. I can quote from this, because I remember that, I remember that particularly, but this says, examined the vessel at 8 A. M., when the hatches were taken off, I examined her for ventilation, and I went at 10 A. M., when they commenced, before they commenced to discharge, after they got the gear rigged, and here is what I say—

Mr. HENGSTLER.—(Intg.) Captain, just testify to what you know now. We do not care what you then said.

(Testimony of Thomas Wallace.)

Mr. LILLICK.—Q. Perhaps you can answer my questions, those that I desire to ask you without that? A. Yes.

Q. What did your examination show with reference to the cause of the damage done to that cement?

A. The top tiers or crates of [63] cement right abreast of the main mast and out in the wings were, the iron hoops were rusted, and I got a hammer and tested the barrels, hammered them, and I told them there were a whole lot of the top tier that was caked.

Q. What in your opinion was the cause of the caking?

A. I then made the test immediately on the barrels and on the hoops for salt water.

Q. What did you find?

A. It showed salt water very plainly.

Q. Captain, what was the condition of the vessel with reference to apparent seepage through the decks of salt water?

A. Well, it was not so bad on the decks, but right alongside the mast and the mast partners, around the main mast, it showed where the water had leaked down there pretty badly.

Q. How is the mast secured as to the timbers supporting it in the deck; how was it?

A. Well, it was just the usual rim and then the wedges going down in the deck, and then there was the usual covering on deck over the wedges.

Q. What did that wood show, if it showed anything, as to stains, or other evidence of salt water?

Mr. HENGSTLER.—On the outside, you mean?

(Testimony of Thomas Wallace.)

Mr. LILLICK.—Q. I mean inside, over where this cement was?

A. It showed that water had leaked down alongside of the mast partners and along the sides of the wedges.

Q. What was your opinion, Captain, as to the general stowage of that vessel as to being good or not good? A. It was good, as far as that goes.

Cross-examination.

Mr. HENGSTLER.—Q. Who asked you to look at the cement and [64] steel plates?

A. This certificate says I was employed by the master of the ship, Captain Baxter. I went and interviewed Captain Baxter on his arrival here, and asked him if he wanted to engage a Port Warden. I asked him if he wanted to engage a Port Warden to survey his hatches and look out for the stowage of his cargo and he hired me.

Q. Now, you came to the conclusion that that cargo was properly stowed, did you, Captain?

A. It was a well-stowed cargo.

Q. I asked you, was it properly stowed, according to your notion of proper stowage?

A. Yes, properly stowed.

Q. Properly stowed? A. Yes.

Q. It was well stowed? A. Yes.

Q. What was in the ship besides this cement?

A. Well, there were steel plates and there was bar steel and there was cement, and there was a very small quantity, if I remember right, of merchandise; but that was stowed away aft in the run of the ship;

(Testimony of Thomas Wallace.)

that is, I don't know what it was, a small quantity of something, but that came out in perfect condition, and I made no comment on that.

Q. Did they have anything else besides what you have mentioned stowed in that ship?

A. Well, there was some small steel bars, and there was plates and there was cement.

Q. You are now speaking of the general merchandise compartment, aren't you, Captain? A. Yes.

Q. And you are sure that there was general merchandise in there, are you?

A. General merchandise, nothing only what I am speaking of. There was cement and other stuff right in there in the center.

Q. Cement and other stuff; what was the other stuff besides the cement. That is what I want to know?

A. I don't remember anything else that was there
[65]

Q. Only cement?

A. There was cement and steel—well, now, I am not—I did not make any comment of that sort, because nothing of that sort was damaged.

Q. You don't really know what was in her at all, do you, Captain? A. I certainly do.

Q. Outside of the cement?

A. The cement and the steel.

Q. What kind of steel?

A. They were plates of steel and there were bars of steel and bundles of steel.

Q. Do you remember those? A. Yes.

(Testimony of Thomas Wallace.)

Q. Whereabouts was the cement stowed?

A. The cement was stowed on top.

Q. The top?

A. On the between-decks and between—it was down in the between-decks on top of the other stuff in the between-decks.

Q. In the between-decks?

A. There were two tiers of cement.

Q. Two tiers of cement?

A. There was cement on top of the steel in the between-decks; that is right up under the deck; then when they came to open up the hatch-way, why, there was some more cement down below.

Q. You mean down in the hold?

A. Down in the lower hold.

Q. What else was down in the lower hold besides the cement?

A. I don't remember anything else besides the plates of steel and these girders.

Q. There were plates of steel down in the lower hold too, were there? A. Yes, there were.

Q. You have not said so; that is what I am trying to get?

A. I said steel plates, I think, a moment ago.

Q. Where were these steel plates in the lower hold with reference to the cement?

A. With reference to the cement, underneath—the steel plates were underneath the cement. [66]

Q. Did you look at the steel plates at all?

A. Certainly.

Q. Now, outside of that department where these

(Testimony of Thomas Wallace.)

things were, the cement and the steel plates and the steel bars and the steel bundles, or whatever you call them? A. Yes.

Q. Outside of that was there any general merchandise in there?

A. You mean in this amidships compartment?

Q. Yes. A. Not that I remember of.

Q. Nothing else? A. Not that I remember of.

Q. What was in the rest of ship?

A. There was coke forward and aft.

Q. Coke forward and aft; much coke?

A. Yes, a great lot of coke.

Q. Almost the whole cargo consisted of coke, did it not?

A. No, not almost the whole cargo; there was a big part of it.

Q. The larger part of it consisted of coke, did it not?

A. No. All this amidships compartment, which was as big as the other two compartments combined, was nearly full of this merchandise in the middle of the ship.

Q. How large was that in the middle of the ship, that compartment? A. I did not measure it.

Q. What proportion of the hold of the ship would you say it would take up?

A. About one-third of it.

Q. About one-third of it? A. Yes.

Q. And all the rest of it was coke, was it not?

A. The forward and aft compartments of the bulk-heads were coke.

(Testimony of Thomas Wallace.)

Q. With reference to these bulkheads, Captain, you say that they were the proper kind of bulkheads?

A. They were the best bulkheads I had seen for carrying coke up to that time.

Q. Do you think that they were air-tight?

A. No.

Q. Not air-tight? A. Not air-tight.

Q. Do you think that these bulkheads were sweat-tight?

A. Well, [67] the boards were fitted as close as they could be for boards that were not planed and dressed off; and they were fitted with mats part of the way up on both sides, and on one side all the way up; that is the side where the merchandise was, right up.

Q. You say there were mats on the outside of the bulkheads, on the coke side of the bulkheads?

A. Up above.

Q. Are you sure, Captain, about that?

A. I am sure on the after end. I can be positive on the after end; the forward end I am not so sure of.

Q. If the captain of the vessel himself and the officers of the vessel, testified that mats were only in the general merchandise compartment, then you will admit that you are mistaken about the mats being outside, won't you?

A. I don't know, I am not sure; my impression is I took the mate and went through the hold, right down in the after hold, the second day down there, when they were commencing to discharge the coke, and I asked him if the mats went all the way down.

(Testimony of Thomas Wallace.)

I know they were right up to the top so as to prevent sweat going through betwixt the beams, and they went down all the way.

Q. They were outside?

A. In the coke compartment.

Q. Outside and in the coke compartment?

A. In the coke *department*.

Q. What were they?

A. Just these regular Chinese mats.

Q. Just ordinary Chinese mats? A. Yes.

Q. Ordinary dunnage mats?

A. Ordinary dunnage mats.

Q. What are they made of, Captain?

A. Made of the same as the others, this Chinese matting, rough Chinese matting.

Q. Rough grass?

A. Yes, rough grass matting.

Q. And you say these mats were also inside the general merchandise compartment, do you?

A. They were there and they were nailed up there.

[68]

Q. When did you see them? Did you see them while the cargo was still in the vessel or after it come out?

A. I visited the vessel three times the first day when she was discharging, and the next day I visited her twice, on the 10th I visited her once, on the 11th once.

Q. That was during the time when the cargo was discharging?

A. When the cargo was discharging I went down

(Testimony of Thomas Wallace.)

through the holds; I went down through the holds each and every time I went there.

Q. Then you took a good look at those bulkheads, did you? A. I did.

Q. How were they constructed?

A. They were constructed with up and down stanchions, and these planks were nailed on to them.

Q. The planks were nailed on to them. Were they tongue and groove? A. No.

Q. They were not tongue and groove? A. No.

Q. Were they battened?

A. They were not battened.

Q. It would have been better, would it not, if they had been tongue and groove—it would have been a better bulkhead? A. Certainly it would.

Q. It would have been a better bulkhead if it had been battened, would it not?

A. Certainly; if it had been battened it would have made a much better bulkhead.

Q. Now, how thick were the boards of that bulkhead, Captain? A. About 2 inches.

Q. About 2 inches? A. Yes.

Q. Are you sure about that Captain?

A. Well, I am only talking from my recollection, I did not measure them; but I measured it looking at it with my eye at that time. I don't think they would attempt to put a bulkhead up that was less than 2 inches to hold the coke in, from dumping into the other part. [69]

Q. Now, they might have been still thicker—might they have been 3 inches?

(Testimony of Thomas Wallace.)

A. They might have been.

Q. They might have been 3 inches? A. Yes.

Q. Might they have been thinner than 2 inches?

A. No, I don't think so.

Q. You don't think so? A. No.

Q. You are prepared to say here that they were two-inch boards, are you? A. That is my opinion.

Q. Therefore, if the captain of the vessel testified, as he did, that they were $\frac{3}{4}$ inch boards, he is mistaken?

A. I don't think that $\frac{3}{4}$ inch would hold the stuff back.

Q. Supposing they had been $\frac{3}{4}$ inch boards, Captain, then this heavy coke pressing against these boards would have made cracks in the boards, would it not? A. It would have been liable to.

Q. It would have been liable to? A. Yes.

Q. And through these cracks the sweat would have penetrated, if only $\frac{3}{4}$ inch boards were used?

A. The matting was up there intact, the matting had not moved a particle when I examined the bulk-heads.

Q. Well, Captain, but this sweat would have gotten as far as the matting and would have penetrated the matting, would it not—would it not have done that?

A. To a certain extent, but there was no sign of sweat coming through the matting; it was perfectly dry.

Q. At the time when you saw it it was perfectly dry? A. Yes.

(Testimony of Thomas Wallace.)

Q. But you admit that if those boards were $\frac{3}{4}$ of an inch thick that the sweat of the coke would have gotten through the cracks and would have gotten into the matter, would it not?

A. It would have done the same thing if it had been 3 inches; [70] if there had been sweat, it would have gone through the space betwixt the boards.

Q. But it would be more likely to go through that space if it was a thin board than if it was a thick board, would it not?

A. If it was a thin board which held the pressure of the coke, the sweat would be no more liable to go through the thin board than the thick one.

Q. Now, Captain, isn't it a fact that if that sweat got into the dunnage mats, the dunnage mats far from preventing damage, would do more damage because it would collect that sweat and it would drop down from the dunnage mats on to the cargo?

A. They would absorb the sweat. They would have a tendency to absorb the sweat.

Q. Don't these dunnage mats have a tendency to absorb sweat? A. Certainly; yes.

Q. A great tendency, haven't they, to absorb it?

A. Dry it up.

Q. Now, you say you examined the cement, Captain? A. Yes.

Q. When?

A. I examined it in the ship and examined it on the dock and examined it every day as long as she had a barrel in her.

(Testimony of Thomas Wallace.)

Q. And you found that the upper tier—

A. (Intg.) Was much the worse.

Q. Was the worse?

A. Yes. That was worse, that was caked.

Q. That was caked? A. Yes.

Q. Was it uniform, that caking? Was that damage spread over the upper tier uniformly or was it localized?

A. No, not all over; it was worse in the wake of the main mast, abreast of the main mast on each side, and in the wings, than it was anywhere else.

Q. But it was somewhat damaged all over, was it not?

A. No, I could not say it was damaged, only that the hoops on the barrels were rusty. [71]

Q. All over, were they not?

A. More or less; I think it was nearly all over—let me look just a moment.

Q. Captain, do you know whether if coke sweat comes in contact with cement it is liable to cake it?

A. You mean coke sweat?

Q. Or any sweat?

A. Well, if a ship sweats enough it will.

Q. Now, a ship that contains coke is likely to sweat more than a ship that does not contain coke, isn't it?

A. Certainly.

Q. As a matter of fact, ships that contain as much coke as this are full of sweat, aren't they?

A. I have made the remark that there was scarcely a sign of sweat to be seen in the ship, in the amidships compartment.

(Testimony of Thomas Wallace.)

Q. Are you prepared to say, Captain, with your experience, that if there is coke carried in the hull of a vessel, practically filling it up, or filling up three-quarters of that, that that vessel is not necessarily full of sweat as the vessel passes through the Tropics, the vessel passing through the Tropics twice and going around Cape Horn? What would be the influence of the heat upon that coke while the vessel passes through the Tropics, Captain?

A. It would cause it to sweat.

Q. It would cause it to sweat and that sweat goes up in vapor to the deck?

A. Yes, and when it comes to getting into cool weather down off Cape Horn it condenses on the beams and comes down.

Q. Comes down like rain all over?

A. To a certain extent.

Q. And that happened twice to this ship because she went around Cape Horn, didn't she?

A. Yes, but this ship was exceedingly well ventilated.

Q. Exceedingly well ventilated? A. Yes.

Q. How was this portion of the cargo that you spoke of, the cement [72] ventilated?

A. The cement?

Q. Yes.

A. It had a big 18-inch ventilator right in the center of this compartment to take the heat up as it generated in the hold.

Q. How far down did that ventilator go?

A. That ventilator went down right to—only to be-

(Testimony of Thomas Wallace.)

low the main deck.

Q. Below the main deck? A. Yes.

Q. Did it go below the between-decks?

A. No, I don't think so.

Q. Are you sure about that?

A. I am not positive.

Q. It might have gone below the between-decks?

A. It might have gone, but that is so long ago, and I did not make any memorandum at that time; I am not prepared to say.

Q. Suppose it had gone below the between-decks, would it have done anything toward ventilating the between-decks? A. If it had gone below?

Q. Yes.

A. Of course if it had been turned—these ventilators are supposed to be turned from the wind, and the wind blows on the back, and it causes a vacuum and the hot air ascends and comes out.

Q. No matter how it is turned, if the ventilator reaches down below the between-decks and into the hold, does that contribute to the ventilation of the between-decks, if there is a floor on the between-decks?

A. If there is no opening in the between-decks in the ventilator, no.

Q. Did you see any openings in the between-decks in the ventilator, in the between-decks part, Captain?

A. I don't know, I have no recollection. I looked at the ventilators, but I didn't make any memorandum of how far the ventilator [73] went down. I

(Testimony of Thomas Wallace.)

don't suppose it went any farther than the main deck.

Q. But if it did go below the between-decks and there was no opening in the between-decks, then you would say the between-decks was not ventilated at all, as far as the ventilator was concerned?

A. Well, it would be on that ship to a certain extent for the simple reason it had no hatches on.

Q. How do you know, Captain—were you on the voyage? A. I mean on the between-decks.

Q. She had no hatches on, you say?

A. The hatches were open.

Q. When the cargo came out?

A. When the cargo came out.

Q. You don't know whether the hatches were open during the voyage, do you?

A. Not the upper deck hatches; I am talking about the between-decks hatches.

Q. I am speaking of the ventilation between-decks. The hatch on the main deck is the only thing that could ventilate the between-decks outside of the ventilator, isn't that so? What has the hatch in the between-decks got to do with the ventilation of the between-decks?

A. It has nothing particular to do, only *if gets* warmer up above than it is down below the thing will go down there and will pump this up when there are no hatches on the between-decks.

Q. You are willing to say, are you not, Captain, if that ventilator went below the between-deck and there was no ventilator between-decks, then as far

(Testimony of Thomas Wallace.)

as that ventilator is concerned it would have nothing to do with the ventilation of the between-decks. You are willing to say that, are you not?

A. Very little. It would have very little to do.

Q. What would it have to do?

A. If the hatches were off in the between-decks, and a certain amount of the air drawn up, it would draw the air through these between-decks and draw it up to the ventilator. [74]

Mr. HENGSTLER.—I will leave that to your Honor, that theory.

Q. Now, Captain, there is one more thing I want to ask you. Do you remember the case of the “Jean Bart,” of the Italian Swiss Colony, against the “Jean Bart”?

A. I don’t know, I am sure. What year was it?

Q. It was in 1911, about 2 years ago. Do you remember that you testified in that case on the nature of the stowage of coke cargo? A. Yes.

Q. You remember that. A. What ship was it?

Q. The French ship “Jean Bart”?

A. Yes, I remember that.

Q. You testified for the Italian Swiss Colony, did you not? A. I am not sure whether I did.

Q. I will stimulate your memory; it was in reference to damage to Chianti bottles?

A. Yes, Chianti bottles.

Q. Where the straw—

A. (Intg.) Was all rotten.

Q. (Intg.) Was destroyed by the coke sweat?

A. Yes, I remember.

(Testimony of Thomas Wallace.)

Q. You remember at that time you testified on the nature and result of coke sweat?

A. Yes, I think I remember it.

Q. Captain, did you not in that case testify to this effect—

Mr. LILLICK.—(Intg.) If your *your* Honor please, this is not proper cross-examination, and apparently the witness is going to be called upon to testify to something he testified in another case, not exactly the same kind of a case.

The COURT.—The objection is overruled.

Mr. HENGSTLER.—The Captain testified in this case that the damage was due to salt water.

Mr. LILLICK.—In that case, so far as we know, the conditions may not have been the same in the “Jean Bart” case as they are in this case. If they are not the same—

The COURT.—That would appear from the question. [75]

The WITNESS.—I will have to look that up. I have the “Jean Bart” case in the book.

The COURT.—Counsel will refresh your memory as to what you testified.

Mr. HENGSTLER.—“Q. Well, do you know what the effect of stowing coke in ships has upon merchandise? A. Yes, I do know that.

“Q. What is it?

“A. Nearly always when the merchandise is stowed close to the coke the merchandise is damaged.

“Q. Why is that?

(Testimony of Thomas Wallace.)

“A. From the sweat caused by, or rather which the coke gives out. Coke coming from Europe, it goes twice through the Tropics, and it gets down in hot weather and it goes up; it gives up a sweat and it collects everywhere; it will go everywhere, go through the decks, and then when it gets down to the cold weather it will condense and hang on and then it will wet everything. In my idea there is only one way to protect that and that is to put up a bulkhead, double bulkheading, and have tar paper between and have ventilation in the compartment so as to let the air in and let it out; you have got to have circulation in there to take care of this excessive amount of moisture the coke gives off.

“Q. How does coke in that regard compare with other merchandise stowed in ships with reference to the amount of moisture which it absorbs and which evaporates from it?

“A. Well, coke is the worst cargo that I know of.

“Q. How is chalk in that regard, do you know?

“A. I never found much damage with chalk, because chalk, they generally put in the bottom of the ship and cover it with a piece of canvas, generally, and then boards on top of that; that is the general way of stowing chalk. [76]

“Q. Suppose coke and chalk is stowed in the hold of a ship and general merchandise is stowed right in the same hold of the same ship, how should the general merchandise be protected in order to make a proper stowage, Captain?”

Mr. LILLICK.—If your Honor please, I don't

(Testimony of Thomas Wallace.)

know what the object of Mr. Hengstler in reading this testimony in the other case is, but I object to his doing that. The effect of reading this other testimony into this record, it seems to me, has an inherent vice, and that is it is impossible for us in any way to counteract the testimony there affecting the facts in this case.

Mr. HENGSTLER.—They are the same facts. He testified in that case under the same circumstances with reference to the nature of coke.

Mr. LILLICK.—You have not asked the witness any question about it; you are reading into this record the testimony in that case.

Mr. HENGSTLER.—I am asking the Captain if he testified in that case in that way, which his testimony shows. I think it is perfectly proper.

The WITNESS.—I can answer in regard to that.

Mr. HENGSTLER.—I am not through with that; there is more.

Mr. LILLICK.—We ask that the testimony that Mr. Hengstler has just read from this other record be stricken out from this record upon the ground that it is immaterial, irrelevant and incompetent and has no proper place in this record.

The COURT.—The objection is overruled. I can see the purpose of it. Your witness came here and testified this was proper stowage in the case of coke with these bulkheads and matting. Now, it seems that he testified in the other case that the only proper stowage would be a double bulkhead with tar paper between. [77]

(Testimony of Thomas Wallace.)

Mr. LILLICK.—Here is our position: Suppose we have a vessel that had at that time the best known means of protecting the cargo. We have only to show to your Honor the fact that we loaded that cargo in the usual and customary manner for that type and kind of cargo, and if we do that, any damage that results to that cargo is not our fault.

The COURT.—You put this witness on the stand to testify that a single bulkhead with matting was proper stowage to separate coke from other cargo. In the former trial he testified that the only proper way was by double bulkheading and tar paper between. I think the testimony is relevant.

Mr. LILLICK.—If Mr. Hengstler is using this testimony for the purpose of impeaching the witness that would be one thing, that is perfectly proper.

The COURT.—I cannot conceive of any other reason.

The WITNESS.—Mr. Hengstler, I would like to ask you a question.

Mr. HENGSTLER.—Let me finish first. I want to finish the whole testimony on that point, on the point of coke sweat and bulkheading. I want to present to the Court the facts about this kind of stowage and about bulkheads.

“Q. Suppose coke and chalk is stowed in the hold of a ship and general merchandise is stowed right in the same hold of the same ship, how would the general merchandise be protected in order to make a proper stowage, Captain?

“A. In order to make a proper stowage one has

(Testimony of Thomas Wallace.)

to go to work and have a double bulkhead with tar paper in between the bulkhead, and have ventilation in each compartment. The ventilation is to take up the heat in there, allow the air to go down one and come [78] up the other so as to give a good circulation of air. There is another way in which it can be done.

“Q. What is the other way it can be done?”

“A. By laying boards on top of the coke and then getting canvas sails and laying them down and carrying them all over the merchandise that is liable to be damaged; cover it over and nail it down so that the moisture cannot get through; the canvas will prevent the moisture from going through into the goods.

“Q. If the coke is separated from the general merchandise in its neighborhood by a wooden bulkhead, would you consider that proper stowage?”

“A. What sort of a bulkhead?”

“Q. By shifting boards.

“A. No, sir. It has got to be air-tight.

“Q. It would have to be air-tight? A. Yes, sir.

“Q. Have you ever seen a wooden bulkhead in your experience that was air-tight?”

“A. Just the ones I have been describing.

“Q. The ones that you have been describing, double bulkheads with— A. Tar paper betwixt.

“Q. But a single simple wooden bulkhead, is that ever air-tight? A. None that ever I have seen.”

Captain, did you testify in the case of the “Jean Bart” in that way?

A. I did. I think if you will look up the record

(Testimony of Thomas Wallace.)

that was after this case, though. Was not that a year after this case.

Q. After this case?

A. The case we are talking about, this "Dolbardan Castle."

Q. I don't know whether it is or not.

A. The record in the first one is 1910 and the other is 1911. We are all the time learning a little more how these things are done. If you find a little more out in a year what the best way to do is, you take advantage of it.

Q. You think the better way is one bulkhead, do you? [79]

Mr. LILLICK.—Q. Do you remember the cargo on the "Jean Bart"?

A. I remember it.

Q. It was an unusually wet cargo, was it not?

A. Certainly. They used the merchandise there, you almost might say, for the purpose of a bulkhead.

Q. Haven't you see cargoes of coke coming to this port and general merchandise also without any bulkheads between them that have come out perfectly clean and free from sweat?

A. Yes, I have. They are covered with canvas, canvas put up and then the coke put in afterwards.

Q. Have you ever in all your experience seen a vessel stowed as was described in the evidence and read to you in the "Jean Bart" case with bulkheads with tar paper in it?

The COURT.—He said he had not.

(Testimony of Thomas Wallace.)

Mr. LILLICK.—Then my recollection is entirely wrong.

The COURT.—I do not understand that he said he had ever seen it, but that would be a very good way to do it.

Mr. LILLICK.—Q. You have never seen it?

A. I have never seen it.

Mr. HENGSTLER.—He has never seen a single one except in the case of the double one—

The COURT.—I don't think he testified there as to any kind he had seen, but that that was the best way, or proper way to erect a double bulkhead and put tar paper in. He does not say he saw any such one.

Mr. LILLICK.—Q. It is a fact that you were reasoning out in this "Jean Bart" case the absolutely impossible way of having any sweat get into the cargo from the coke. If you put up a double compartment and tar paper between and hermetically sealed it up, then there would be no way of sweat coming through?

A. That is something [80] I reasoned out, and I also made a cut of that thing for Johnson and Higgins and told them that was the only way I thought the thing could be done.

Mr. LILLICK.—Will you read the question? Mr. Hengstler I have never heard of cargo stowed that way, and I don't believe anybody ever has.

Mr. HENGSTLER.—That is what I thought when I said he had testified to it.

Mr. LILLICK.—Q. Did you ever hear of cargo

(Testimony of Thomas Wallace.)

being stowed that way? A. I never seen any.

Mr. HENGSTLER.—This is the one he seems to have been describing putting boards on top of the coke, then getting canvas and covering all merchandise over that is liable to be damaged. I did not gather from that, although the Captain may have meant it, that he had seen bulkheads made in that way.

A. I have not meant it; I have never seen any.

The COURT.—Q. Double bulkheads with tar paper between?

A. Yes. There is for coal. There were some coal ships came here and they went to work and loaded in Antwerp, and when they loaded they were to go to Cardiff, and take in Cardiff coal, and that Cardiff coal will sweat more; that is dirty. I wrote a letter at some of the owner's suggestion, suggesting they put a bulkhead the same as I put there, with tar paper betwixt and double bulkheading; with the tar paper fitted in between the beams, that would protect it and prevent the coal dust from getting out, and the sweat from getting through at the same time. I have never seen a bulkhead put up that way, because that is an expensive proposition.

Mr. LILLICK.—Q. You have never known of coke being carried in that way? A. Never.

Mr. HENGSTLER.—Q. What I referred to is this, "have you ever [81] seen a wooden bulkhead in your experience that was air-tight? A. Just the ones I have been describing." That would infer he had seen them.

(Testimony of Thomas Wallace.)

A. That might have been the one I have been describing for the purpose of putting in the coal ships. These tramp ships when they come out they load up all the cargo they possibly can and then they go around to take fuel in at Cardiff, and they used to go to work and put up any sort of bulkheads, and of course when they came out here the cargo would be all covered with coal dust and be damaged all over.

Mr. LILLICK.—Q. Captain, going back to your recollection of your examination of that cargo; you did examine this particular ship, the “Dolbardan Castle,” and examined these bulkheads with reference to finding out whether or not it was sweat?

A. Yes.

Q. Did you find any?

A. I did not. Here is one of the memoranda that I made at the time. I remember it very particularly. It is before they ever pulled the bulkhead down, before the bulkhead was taken down; it is on August 15th; the bulkhead was taken down and discharged coke over the top of the steel plates; the plates were seen to be clean and bright. In the after end before the bulkhead was taken down, clean and bright; there was no sweat on the after end. I remember they pulled the bulkhead down; it was easier to take the coke over the top of the plates and discharge it through the main hatch than it was to take it out the small hatch aft.

Q. Captain, there would be a possibility, not only a possibility but a probability, that salt water dis-

(Testimony of Thomas Wallace.)

charged into the hold of the vessel by reason of the seams opening, and after it was down into the hold of the vessel when it went through the Tropics would evaporate and cause sweat or this vapor that they call sweat in the [82] hold of a vessel, would it not?

A. It would have a tendency to do that. Of course the heat would cause it to dry up and the salt crystals would stay on the iron, iron that was not painted, such as was on the hoops of the cement barrels.

Q. And it would rise in the form of sweat and gather on the barrels, would it not? A. Yes.

Q. Captain, in examining the bulkhead of the "Dolbardan Castle" you did not see any salt in it?

A. I did not examine that; I merely looked at the matting on the outside.

Mr. HENGSTLER.—Q. You did not see any sweat in the middle compartment at all, did you, Captain?

A. I will look at my memorandum and see what I saw.

Q. Have you any recollection, Captain, as to whether you saw any sweat?

A. No; no signs of sweat on the coamings or on the beams, or on the sides of the ship. That is in the between-decks, I am speaking of.

Q. Have you any present recollection as to whether you saw any sweat in the middle compartment independent of what you have got there?

A. Well, no, I don't know as I have.

Q. You have not any recollection?

(Testimony of Thomas Wallace.)

A. No; it is so long ago I don't remember anything about that.

Q. Have you any recollection as to whether there was any sweat in the coke portion of the vessel, in the portion of the vessel that was loaded with coke?

A. In the after and forward ends?

Q. Yes.

A. There was some in the after end. I remember that.

Q. Do you remember whether there was some in the forward end?

A. Well, I do not. I only remember there was coke in that part of the ship, there was nothing else but coke, and I don't know as I went down in the fore peak of the vessel at all. I went in the after end because I thought there was some merchandise [83] stowed away in the after end. I think that is the reason why I went down.

Q. When you say that you did not notice any sweat at all in the general merchandise compartment, do you mean that you did not notice any moisture at all? A. No moisture.

Q. No moisture at all? A. It was dry.

Mr. HENGSTLER.—That is all.

Mr. LILLICK.—That is all.

[Testimony of Raphael Lopez, for Respondent.]

RAPHAEL LOPEZ, called for the respondent, sworn.

Mr. LILLICK.—Q. What is your occupation, Captain? A. Master mariner.

Q. How long have you been a master mariner?

(Testimony of Raphael Lopez.)

A. For six years.

Q. In what vessels have you sailed as master?

A. Large ocean passenger liners, cargo boats, cattle boats, passenger ships.

Q. Have you ever carried a cargo of coke in any of the vessels of which you were master?

A. Yes, sir.

Q. Captain, in 1910 would you have considered a cargo properly stowed where the forward portion of the ship had coke, the aft portion had coke and the middle general cargo consisting of cement and steel plates, where between the coke and the general merchandise a bulkhead was built of boards running athwartships so that they lay one upon the other so that daylight could not be seen through them and matting nailed over them, proper?

A. I would, sir. [84]

Cross-examination.

Mr. HENGSTLER.—Q. Where do you live, Captain?

A. In San Francisco; 440 Eddy Street.

Q. Who asked you to come here as a witness, Captain? A. Mr. Lillick.

Q. When did he ask you? A. Yesterday.

Q. Now, you say you have been a master mariner for six years; what was your business before that, Captain?

A. Officer in steamers and sailing ships.

Q. What kind of ships have you been master in?

A. Ocean liners, passenger ships, mail boats, cargo boats.

(Testimony of Raphael Lopez.)

Q. What cargo boats have you been master of?

A. The White Star line; cattle boats.

Q. Cattle boats? A. Yes, sir.

Q. Have you ever been master of a sailing ship that carried coke?

A. No. I have been mate of a sailing ship that carried coke.

Q. How long ago, Captain?

A. 19 or 20 years ago.

Q. What was the name of that ship?

A. The "Hadden Hall."

Q. On what voyage were you mate?

A. To Australia.

Q. From where? A. From London.

Q. That is all you know about coke carriage, 19 or 20 years ago, on one occasion when you were first mate? A. Yes, sir.

Q. You were not responsible for that stowage of that coke at that time, were you?

A. The mate is always responsible for the stowage of the cargo.

Q. I thought the captain was always responsible for the stowage of a cargo.

A. The captain is never there when the cargo is being stowed; the captain is up at the office. [85]

Q. Were you responsible for the stowage of that cargo of coke on the ship "Haddon Hall" 19 or 20 years ago? A. To a certain degree.

Q. To what degree?

A. Seeing that it was properly stowed.

Q. What else did the "Haddon Hall" carry at that

(Testimony of Raphael Lopez.)

time? A. A general cargo.

Q. What kind of a general cargo?

A. What might be called notions in America.

Q. Notions?

A. Yes, milk and whiskey and coffee.

Q. And bottled goods?

A. Yes, bottled goods, and all that sort of thing, and bundles of cotton.

Q. Did she carry, to your knowledge, any cargo that was susceptible to damage by sweat?

A. No, we had no damage.

Q. I say, do you remember whether she carried any cargo on that voyage that you mention that was susceptible to sweat? A. Yes, quite a lot.

Q. What cargo? A. Cotton goods.

Q. Where were those cotton goods stowed in the "Haddon Hall"? A. In the lower hold.

Q. Where was the coke?

A. In the forward end of the ship.

Q. Were there separate compartments in that ship? A. No, none at all, sir.

Q. It was just one big hold?

A. Just one big hold.

Q. Was there any claim on those cotton goods, Captain?

A. No, none at all, sir; there were claims on broaching cargo.

Q. But no damage claim?

A. No, no damage claims.

Q. And that is all you know about it with reference to the cargo having been damaged, that there were no claims? A. Yes. [86]

[Testimony of W. F. Mills, for Respondent.]

W. F. MILLS, called for the respondent, sworn.

Mr. LILLICK.—Q. What is your occupation?

A. Marine Surveyor.

Q. How long have you been Marine Surveyor?

A. 14 years.

Q. Prior to that time what was your occupation?

A. Prior to that I was in the stevedoring business in San Francisco.

Q. When were you on vessels, when did you follow the sea?

A. I followed the sea for 18 years steady.

Q. Have you ever been captain of a sailing vessel?

A. I have.

Q. Have you ever been on voyages from Antwerp or Rotterdam, or from France or from London down around the Horn and up on this side?

A. I never have been from the ports you mention; I have been from Liverpool.

Q. In any voyage you have ever gone on around the Horn have you carried coke as a part of your cargo?

A. I had some coke on one voyage from Liverpool to San Francisco, and a general cargo.

Q. General cargo with it?

A. Yes, bleaching-powder, caustic soda and pig iron and coal.

Q. Captain, during your experience as stevedore have you ever had occasion to load cargoes of coke and general merchandise?

A. No; I have discharged several cargoes.

(Testimony of W. F. Mills.)

Q. You have discharged several cargoes?

A. Yes, sir.

Q. Can you state whether prior to 1910 it was usual or customary to have air-tight bulkheads between a cargo of coke and general merchandise, in a general cargo carrier?

Mr. HENGSTLER.—Mr. Lillick, do you claim that it would be proper stowage? [87]

Mr. LILLICK.—There are a number of cases, Mr. Hengstler, holding that where a ship owner loads his cargo according to the customary and usual way of loading it he is not liable for any loss resulting from sweat.

Mr. HENGSTLER.—Pretty old cases, aren't they?

Mr. LILLICK.—This new theory that you are trying to impose upon us this afternoon results in our calling upon the old cases for the position we take, in addition to our exemptions under this charter-party.

Mr. HENGSTLER.—It is no longer a new theory since the "Jean Bart" has been reported.

Mr. LILLICK.—I decidedly disagree with you on that, Mr. Hengstler. Will you read the question, Mr. Reporter?

(Question repeated by the Reporter.)

A. To the best of my knowledge it was not.

Q. Captain, what, in your opinion, was the stowage of a vessel as to being good stowage or poor stowage, where she had a cargo of coke in her fore holds and coke in her aft holds and general mer-

(Testimony of W. F. Mills.)

chandise consisting of cement and steel plates in her amidships portion, where the coke was separated from the general cargo by bulkheads made of boards laid athwartships closely enough so that daylight could not be seen through between them, and then upon those bulkheads matting; would it be good stowage or bad stowage?

A. Well, yes, it would be good stowage; I should consider it would be taking good care of the cargo. I would hardly call it technically good stowage. It is taking good care of the cargo. [88]

Cross-examination.

Mr. HENGSTLER.—Q. Captain, you say you had experience with one vessel that carried coke?

A. I have had experience in discharging several.

Q. As a navigator?

A. As a master mariner, yes. I brought out some coke, I cannot recall how much it was; it was several years ago.

Q. How long ago was it, Captain?

A. Oh, it was 34 or 35 years ago.

Q. Do you remember the name of the ship?

A. That was the ship "Harvey Mills."

Q. What kind of a vessel was she?

A. She was a wooden ship, three decks.

Q. She was technically a ship? A. Yes.

Q. A wooden ship? A. Yes.

Q. And with three decks? A. Yes.

Q. Do you remember where the coke was stowed?

A. I think the coke was stowed forward.

Q. In the lower hold, or where?

(Testimony of W. F. Mills.)

A. I think in the lower hold; yes, sir.

Q. Where was the general merchandise stowed?

A. All over the ship excepting where the coke was.

Q. Was there any general merchandise in the lower hold?

A. No, I think the most of the merchandise was in the lower between-decks and some in the upper between-decks.

Q. As a matter of fact, the lower hold would only contain the very heavy cargo, would it not?

A. Not necessarily, no. It would not do to put the heavy cargo in the lower hold; that would be bad stowage. [89]

Q. The heavy cargo in the lower hold would be bad stowage? A. Yes.

Q. Is it not the usual method of stowage to put the heavy cargo in the lower hold?

A. No, quite the reverse. There is a center of gravity to a ship and the cargo that is stowed in a vessel has to be distributed according to its weight or bulk; it is not like piling it in a warehouse.

Q. It depends on the character of the vessel, does it not, as to where you put your heavy cargo?

A. No; if you put your heavy cargo on the bottom of the ship and send it to sea that way, the chances are she would have no masts in her if she got into bad weather.

Q. Where would you put your heavy cargo?

A. I would distribute it, some in the hold and some in the between-decks.

(Testimony of W. F. Mills.)

Q. So far as weight is concerned, what is the usual proportion of the weight of the cargo in the hold and the weight of the cargo in the between-decks?

A. In most of the late British vessels it is about one-third to two-thirds; that is, one-third in the between-decks and two-thirds in the hold.

Q. You do not remember, Captain, do you, what other cargo there was in the lower hold of that vessel, the "Harvey Mills"?

A. No, I do not; that was a long time ago.

Q. You say it is not customary to have air-tight bulkheads between coke and general merchandise?

A. To put an air-tight bulkhead in it would be necessary to have it caulked.

Q. It would have to be caulked? A. Yes.

Q. If it were caulked it would be air-tight, would it not? A. It would; yes, sir. [90]

Q. It would be sweat-tight too, would it not?

A. Yes, sir; it would have to be tight to prevent water or air going through it, to be perfectly air-tight.

Q. Supposing it were tongue and grooved, that would prevent the sweat and prevent the air from going through, would it not?

A. It would if it were properly put in. Then the ends would have to be tight or be caulked to prevent the air going through there.

Q. In the kind of a bulkhead Mr. Lillick described to you, where one board is just naturally placed on top of the other one, have you ever seen a bulkhead where you could not see daylight through?

(Testimony of W. F. Mills.)

A. Well, I don't know that I have ever seen bulkheads after they were left there but at the same time a bulkhead could be put in that way with matting where you could not see daylight through it.

Q. It could be? A. It could be; yes, sir.

Q. But is it probable, Captain, that you could not see daylight between boards as you put one on top of the other, without connecting them, or without caulking, or anything?

Mr. LILLICK.—I object to the question on the ground that it is common knowledge; I don't know that we have to take this witness' opinion about that at all.

Mr. HENGSTLER.—The witness will probably agree with all of us that it is impossible not to see daylight through if that is the manner in which the bulkhead is constructed. I suppose everybody has seen rough-board cottage built, with one board nailed on top of the other one, and that you can see daylight through.

Q. Now, Captain, supposing the boards are only $\frac{3}{4}$ of an inch [91] thick, the boards in that bulkhead, and it is constructed in that way, by placing one board naturally on top of the other one, would you say that that was a proper bulkhead to keep 1,000 tons of coke from the general merchandise compartment?

Mr. LILLICK.—If your Honor please, not having read the testimony, your Honor will not know that there is no testimony at all was piled flush against the bulkhead. That is a hypothetical question and

(Testimony of W. F. Mills.)

it is not based on any testimony in the case.

Mr. HENGSTLER.—I think it is all through the testimony that it was put in in bulk. The very object of the bulkhead is to keep it from going over to the other merchandise at all.

Mr. LILLICK.—No; quite the contrary; the bulkhead was put in with the prime object of obviating the sweat.

Mr. HENGSTLER.—That is also a matter of common knowledge and common sense. I am willing to leave that to the Court.

A. I am perfectly ready to answer the question.

Mr. HENGSTLER.—What was the question, Mr. Reporter?

(Question repeated by the Reporter.)

A. It most assuredly would be if there were sufficient uprights and if those uprights were near enough together. A closer bulkhead could be built with $\frac{3}{4}$ inch stuff than it could be with 3-inch stuff. It must necessarily have sufficient uprights though, and if they are near enough together a $\frac{3}{4}$ inch bulkhead is sufficiently strong enough because the pressure of that coke would depend on the uprights that they were nailed to or fastened to.

The COURT.—Whether or not this was a sufficient bulkhead to keep the coke out it did keep it out, so aren't we taking up time in discussing this proposition? The only question is, was it enough to keep the sweat out? [92]

Mr. HENGSTLER.—The pressure of 1,000 tons of coke against that support would dislocate the sup-

(Testimony of W. F. Mills.)

port, would it not?

A. Not if there was sufficient support backing it up. You have to have uprights or stanchions of course for your bulkhead to come against. A vessel 40 to 44 feet beam with simply the regular stanchions that are in amidships is too long a span without any other uprights or stanchions.

Q. Captain, would this bulkhead that was described to you by Mr. Lillick be an air-tight bulkhead?

A. Well, it might be an air-tight bulkhead if it was built close to the decks and had matting against it. It is a question if it will keep air out. Air will usually get where water will.

Q. So far as the boards alone are concerned without the matting, will it be an air-tight bulkhead?

A. It ought to be, comparatively speaking, very near air-tight.

Q. If it had been constructed in the way that was described to you, will it probably be an air-tight bulkhead? A. It might possibly be.

Q. It might possibly be? A. Yes, sir.

Q. Would it be a sweat-tight bulkhead or would the sweat penetrate between the joints of the boards?

A. The sweat would swell the boards so that it would be much tighter caused by the sweat than if there was no sweat.

Q. If your vessel passes through the tropics there is a great deal of heat, is there not?

A. As a rule, yes.

Q. What is the effect of heat upon this kind of

(Testimony of W. F. Mills.)

bulkhead, where one board is put on top of another one?

A. The heat would tend to shrink the boards and the moisture would tend to swell them. [93]

Q. Heat would tend to shrink them?

A. Yes, sir.

Q. So it probably would have the effect of making openings between the joints, would it not?

A. It would, yes; of course, that would depend a great deal upon the thickness of the bulkhead. If it was a thin bulkhead it would have more cause to shrink and swell than it would if it was thick. On 3-inch timbers the heat and the moisture would have little effect on the swelling or shrinking.

Mr. LILLICK.—No further witnesses.

[**Testimony of Robert F. Pillsbury, for Libelant.**]

ROBERT F. PILLSBURY, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Captain Pillsbury, what is your business?

A. Marine Surveyor and Surveyor of the Bureau Veritas, Registered.

Mr. HENGSTLER.—Mr. Lillick, is it admitted that Captain Pillsbury is an expert navigator and an expert on the stowage of cargoes, or shall I prove it?

Mr. LILLICK.—No, it will be admitted.

Mr. HENGSTLER.—Q. Captain Pillsbury, what connection had you with the British ship “Dolbardan Castle,” that arrived in this port in August, 1910?

A. At the request of Parrott & Company I made a

(Testimony of Robert F. Pillsbury.)

survey of the vessel at the time the hatches were taken off. I surveyed the cargo that day as far as possible, the upper tiers of cement; I examined the bulkhead or bulkheads separating the cement from the coke; and from time to time I examined the sheet iron, particularly in the hold and on the wharf for the purpose of determining the cause of damage to the cement and the sheet iron or plates. [94]

Q. What condition did you find the cement in, Captain?

A. I found practically the whole upper tier of cement caked. I first tried those under the hatch and as they all appeared to be caked I then took an instrument, either a piece of wood or a hammer, I don't remember which now, and crawled all over the upper tiers of cement and sounded most of the barrels, perhaps not all but enough to get a good idea as to their condition.

Q. And you say you found them caked?

A. I found all of the upper tier caked, all that I sounded, and I think I sounded two-thirds of them; they all rung, indicating that they were hard on the upper side or upper parts.

Q. How was that cement stowed with reference to the steel plates that you examined?

A. My recollection is that that space in the between-decks for general cargo, that space of the ship for general cargo was filled in the between-decks with cement, and some iron on the deck of the between-decks; and then in the lower hold—in the upper part there were several tiers of cement also.

(Testimony of Robert F. Pillsbury.)

Q. And the damaged barrels that you speak of were the upper tier of cement that was stowed in the between-decks?

A. Those are the ones I refer to. I could not swear to the others because I did not pay so much attention to the cement except on that first day.

Q. Did you examine that cement as it came out of the ship, or before it came out of the ship?

A. No, I examined it before it came out.

Q. Before it came out? A. Yes. [95]

Q. Now, Captain, did you notice that there was coke in the fore and aft part of that ship?

A. I did.

Q. When you knew there was a damaged cargo, you had some idea that that coke had something to do with it, you started out with that idea, did you not, Captain?

A. I cannot say that I started out with it; I started out to find the cause of the damage, with an open mind. I try to have an open mind.

Q. Did the bulkheads have anything to do with the cause of the damage, in your opinion?

A. Well, I examined the bulkheads.

Q. In what condition did you find them?

A. I found the bulkheads to be built of ordinary boards, laid one on top of the other, rough boards. I could see spaces where air and moisture and daylight, if the other side were open, so that I could see through it; on top, under the deck, I put my hand in several places where the bulkhead did not fit closely up to the deck.

(Testimony of Robert F. Pillsbury.)

Q. You heard the testimony here with reference to damaged mats; did you notice any damaged mats on the bulkhead?

A. I saw a few damaged mats on every bulkhead; some of those were displaced.

Q. That is the usual case, is it not, that these mats are displaced and are lying all over the hold, after the cargo is discharged?

A. I am referring to before the cargo was discharged.

Q. They were displaced even before the cargo was discharged?

A. Yes. That is not always the case though.

Q. But that was the case in this instance?

A. That was the condition I found. [96]

Q. Would you say that that bulkhead was sweat-tight, Captain? A. No, sir.

Q. You are familiar with the nature of coke, are you not, Captain Pillsbury?

A. Reasonably so.

Mr. HENGSTLER.—I don't know that it is necessary to go into that. Is it admitted that coke is a great absorber of moisture and a great producer of sweat in a vessel, Mr. Lillick?

Mr. LILLICK.—You already have testimony about that. I would rather not make any admission. It depends entirely upon the coke and how it is treated; sometimes it arrives clear, with no moisture, and sometimes it is wet.

Mr. HENGSTLER.—Q. What is the quality or nature of coke with reference to producing sweat in

(Testimony of Robert F. Pillsbury.)

the hold of a ship when it is stowed in a vessel, Captain Pillsbury?

A. Many times it produces a very bad sweat, so many times that in my opinion it is dangerous to carry it in the compartment with dry cargo.

Q. So far as its quality is concerned you call it dangerous; so far as quantity of moisture is concerned, what is your opinion with reference to that?

A. It depends on a good many conditions; first, whether it is loaded dry or wet; and furthermore, to some extent, on the car that is given, the ventilation that is given, the facility for ventilation during the voyage.

Q. Do you know how it usually comes into the hold of ships at Rotterdam or Antwerp, Captain? Have you any experience in that line?

A. Not from my own knowledge; no, sir.

Q. Do you know from your own knowledge how it usually comes out of ships here in this port, with reference to containing moisture? [97]

Mr. LILLICK.—If your Honor please, we object to that inasmuch as the Captain does not know what the situation was in this particular sense; what the situation is otherwise is not at all material. We object to the question as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

A. Only from the effects on other cargo.

Mr. HENGSTLER.—Q. What is the usual effect on other cargo, Captain, within your experience as a marine surveyor of cargoes and as an expert?

(Testimony of Robert F. Pillsbury.)

A. In the most cases that have come under my observation there has been damage to other cargo stowed in the same ship with the coke caused by the sweating of the coke.

Q. How many ventilators were in the neighborhood of this damaged coke?

A. There was one ventilator that went down through the pump-well casing which terminated under the between-decks so that in this case it was practically of no value in ventilating that space.

Q. In your opinion, did that fact contribute to the damage produced in the cement?

A. I think it did.

Q. What is your opinion as to what produced that damage to the cement, Captain?

A. Well, I made a report at the time and I stated that in my opinion there were two causes; there appeared to me to have been a leak in the decks or at the aft part of the hatch, or around the mainmast and some salt water got down through the decks around the mast and contributed to the damage.

Q. What produced the greater part of the damage, Captain, in your opinion, and from your investigation? [98]

A. In my opinion the sweat from the coke produced the greater damage.

Q. From your investigation what would you say was the proportion of the damage caused by the sweat as it bears to the damage caused by a possible leak in the deck?

A. I have already estimated that and expressed

(Testimony of Robert F. Pillsbury.)

the opinion that it was two-thirds sweat and one-third salt-water damage.

Q. The salt water that you speak of, where did that come from?

A. That came from the leaks through the decks and abaft the hatch and around the mainmast.

Q. Could it have come from any other source, Captain?

A. No, I think not; I think that is the cause of it.

Q. Now, so far as the steel plates are concerned, you examined those, did you? A. I did.

Q. How did you find them, Captain?

A. Well, I found a great many of them rusted and pitted; they were damaged principally by the pitting. I made some tests myself and the salt reaction on those that I tested was so very slight that I recommended a chemist more expert in such matters than myself to make an examination. I found very little evidence of salt water, in my opinion, very slight salt reaction; in some none at all.

Q. What was your conclusion from that with reference to the cause of the damage?

A. That it was caused by the sweat from the coke, carrying some chemical contained in the coke.

Q. When you examined the damage to the steel plates did you find it localized in particular spots or was it all over the plates?

A. Pretty much all over the plates; pretty much all over the plates and pretty much throughout the pile. [99]

Cross-examination.

Mr. LILLICK.—Q. Captain, you are usually

(Testimony of Robert F. Pillsbury.)

called to examine cargoes by reason of damage done to them, are you not? A. Yes, sir.

Q. And when you testified a few minutes ago that you had on many occasions examined vessels that had general cargo and coke, you were referring to cases where you had been called upon to go down and make examinations of damage?

A. That is right.

Q. It is a fact, is it not, Captain, and a fact of your own knowledge, that Meyer, Wilson & Co., Balfour, Guthrie & Co., and other shipping-houses here in San Francisco have for a great many years shipped coke into this port in vessels carrying general cargo as well? A. I think that is so.

Q. Is it not also true, Captain, that for a great many years coke has been carried with general cargoes in sailing vessels to this port without separate compartments?

A. Without separate air-tight compartments, yes, sir.

Q. And in testifying as you did a few moments ago on the questions asked you by Mr. Hengstler when you stated that the cargoes that you had examined, where damage had been shown, were cargoes where you had been called in to examine them by reason of certain damage that had been done to that cargo?

A. That is right.

Q. How many ventilators were there on this ship, do you remember?

A. There was a set of ventilators on the forward

(Testimony of Robert F. Pillsbury.)

end, also a set on the aft end and one central ventilator.

Q. That would be five? A. I think so.

Q. It is also true, is it not, Captain, that this middle compartment where the cement and the steel plates were carried [100] had no division between the upper hold and the lower hold; in other words, that it was a clear hold without any between-decks?

A. Yes, sir. It was not laid between-decks.

Q. In other words, there was a free circulation of air between the upper hold and the lower hold, with the exception of where the cement was piled in the barrels? A. Yes, sir.

Q. That ventilator you speak of in the main compartment was how large?

A. I don't remember the diameter of it.

Q. Do you remember looking to see whether there were any openings in that ventilator on the way down?

A. To the best of my recollection I did look but I found not. I am not absolutely positive about it.

Q. If the captain of the vessel testified there was an opening below on the upper deck and in between-decks you would not want to be understood as testifying positively that there was not, would you?

A. No, except that it is my impression that there was no ventilation in between-decks.

Q. It is not true, Captain, that the salt water that leaked into that vessel would in and of itself have caused sweat upon the vessel going down through the tropics and then after the water evaporated and

(Testimony of Robert F. Pillsbury.)

formed moisture and then again condensed going around the Horn where it was cold?

A. I don't think there was enough of it to come in to cause any considerable amount of sweating.

Q. Is it not true that would have been the result if there had been a quantity of salt water come down?

A. Well, "a quantity" is an indefinite term.

Q. Well, is it not true, Captain, that the water itself would have caused sweat?

A. Yes, but not so extensive as I found evidences of. [101]

Q. Did you examine the steel plates with reference to their ends and how the rust appeared upon the edges of the plates?

A. I examined them pretty thoroughly; yes, sir.

Q. Did you not find that the damage from the rust was confined pretty largely to the edge of the plates and then for a short distance in?

A. No, I found it very extensive throughout the plates.

Q. Did you notice the color of the rust?

A. Yes; I think it was a whitish color.

Q. A whitish color? A. Yes, sir.

Q. What test did you make of it?

A. I made the ordinary salt-water test, nitrate of silver. I scraped these particles off and then I put them in distilled water and applied nitrate of silver. If I put them in ordinary water there would have been salt reaction from the ordinary fresh water drawn from a faucet.

Q. Captain, do you know whether sweat that arises

(Testimony of Robert F. Pillsbury.)

from coke carries with it chemical in solution, or ever carries with it chemical in solution such as sulphur?

A. You mean in my own knowledge?

Q. Yes.

A. I could only say as it is applied to steel in a ship. I know that ships that carry coke, whether the coke has actually come in contact or whether it is between-decks or on the under part of the deck it affects the paint; the paint comes off and the steel is corroded, unless it is well coated with paint. On a long voyage it will even then come off and start corrosion.

Q. But in a deposit made from sweat from coke have you ever known of sulphur or any other chemical deposit to be left? [102]

A. Well, I can draw that deduction from what I have seen.

Q. And then the example you have given us of the plates of a vessel, as to paint?

A. Yes. I have seen other steel that has been stowed right in with coke very badly eaten by it. I have had enough cases to say that my deduction could be that.

Q. That is where it came in direct contact with the coke? A. Yes.

Q. But in coming in contact with sweat arising from coke and then carried over by moisture and deposited on the plate?

A. Yes, I have seen a number of instances to draw that conclusion.

(Testimony of Robert F. Pillsbury.)

Q. You don't know, Captain, do you, that the cause of this rust upon the plates was the sweat, you are only assuming that, are you not?

A. That is my opinion.

Q. That is your personal opinion? A. Yes, sir.

Q. Captain, do you not know, as a matter of fact, that coke very often does arrive here in San Francisco in ships carrying general cargo and there is no damage?

A. Well, I don't know how to define the phrase very often; I said once before that in my experience as a marine surveyor there seems to be more cases where the general cargo comes damaged; so much so that very few of the merchants are now shipping general cargo with coke.

Q. Is it not a fact, Captain, that if coke were stowed in a vessel at Rotterdam dry as when it came from the ovens, and that the ship's decks did not leak throughout the voyage, and the ventilation were attended to, that cement might be stowed in the same hold with only the separation of a wooden bulkhead and six inches of air space between and come out undamaged from sweat in San Francisco? [103]

A. Only under very favorable conditions.

Q. What do you mean by under very favorable conditions?

A. I think I stated that before; very good ventilation and very well attended to.

Q. Do you remember when you made your examination of the vessel and the captain of the "Dol-

(Testimony of Robert F. Pillsbury.)

badarn Castle'' called your attention to a streak of water that apparently had run down the matting upon one of these bulkheads, and having a conversation with him as to whether that came from salt water?

A. No, I do not remember the conversation; it is possible there may have been one.

Q. Do you remember seeing a streak of water on that bulkhead coming down from the *the* mast?

A. A streak of water coming down from the main-mast?

Q. Coming down from about where the mast was and where the bulkhead ran up to the deck?

Mr. HENGSTLER.—Which bulkhead?

Mr. LILLICK.—I don't know whether it was the forward or the rear one.

A. The mast would not be near the bulkhead.

Q. Disregarding the mast, do you not remember seeing a streak of water that apparently had run down the mast?

The COURT.—When you speak of a streak of water do you mean the marks?

Mr. LILLICK.—Q. The marks of water and they found that water to be salt water by reason of tests subsequently made?

A. I stated there was evidence of salt water having come in at the aft part of the hatch.

Q. And there was a streak down the matting that evidenced a deposit of salt upon it?

A. I think there may have been. [104]

Q. Did you not have a conversation—now that

(Testimony of Robert F. Pillsbury.)

your recollection has been refreshed about it—with the captain and someone there tasted that matting?

A. I don't know that I had a conversation with the captain; it is possible I may have done so.

Q. But you do remember that that matting had a streak upon it? A. I think one mat was wet.

Q. Do you remember a test was made, someone tasted it and said it tasted like salt?

A. No, I don't remember that.

Q. How did the number of ventilators on the "Dolbadarn Castle" comply with the rule of the Bureau Veritas?

A. I think the number was about what was required.

Q. And as to construction also?

A. No, because the opening there, you are required to have it open amidships right under the main deck.

Q. Do you know what the "Dolbadarn Castle" is classed in? A. Lloyds' Register, I think.

Q. Are there not a great many more vessels classed in Lloyds' Register than in the Bureau Veritas?

A. Yes, many more.

Q. Are not the rules of Lloyds' Register accepted by insurance companies the world over?

Mr. HENGSTLER.—If your Honor please, I object to that as immaterial and irrelevant in every respect.

Mr. LILLICK.—Under the claims of the libellant, as I understand it, and it was so stated by Mr. Hengstler in the opening statements, there was no proper ventilation. It is upon that point that this is offered.

(Testimony of Robert F. Pillsbury.)

Mr. HENGSTLER.—Would it make it proper ventilation because the rule of one company or another company requires [105] certain minimum ventilation for any kind of merchandise, when there is a special kind of merchandise here that is particularly destructive?

Mr. LILLICK.—Lloyds' classification is not one company; it is a general classification recognized all over the world as being a proper classification. It has certain vessels registered with certain equipment. That is what I want from Captain Pillsbury.

Mr. HENGSTLER.—Mr. Lillick, supposing Lloyds' Register sanctions a ventilator that does not ventilate in between-decks at all, would you say that that settles it?

Mr. LILLICK.—It would not, but your own knowledge is that Lloyds' Register passes in its examination only vessels that have proper ventilators and have proper ventilation.

Mr. HENGSTLER.—That is not the general experience at all. It may be so or it may not be so. Custom has nothing to do with it.

Mr. LILLICK.—Q. Captain Pillsbury, how about that? A. Please repeat the question.

Q. Are vessels classed in Lloyds and passed upon in their examination considered properly equipped passed by them? A. Yes, sir.

Mr. HENGSTLER.—If properly passed by them, I suppose.

Mr. LILLICK.—Q. Is that true the world over, Captain? A. Yes, sir.

(Testimony of Robert F. Pillsbury.)

Q. It is recognized amongst insurance companies as well as amongst ship owners and cargo owners that a vessel that has passed inspection by Lloyds is for the purposes of the trade and for the purposes of issuing policies of insurance upon her proper?

A. Yes, sir. [106]

Q. Did you notice whether the deck of the "Dolbadarn Castle" had been caulked recently?

A. That I do not remember.

Q. She was a vessel of standard type, was she not, in the trade she was running in? A. Yes, sir.

Q. In your opinion she was a perfect seaworthy vessel, and there is no question about her general equipment? A. I think not.

Q. Is not coke one of the usual component parts of a general cargo shipped from Rotterdam and Antwerp? A. Well, I would say yes and no.

Q. You have to say yes and no to that?

A. Yes and no.

Q. What do you mean by that, Captain?

A. Well, if I said yes I would be saying something that I do not think proper; that is, I do not think it is the proper cargo.

Q. I asked you whether it was not a component part of most of the cargoes shipped from Rotterdam and Antwerp? A. I think not now.

Q. Was it in 1910?

A. Well, before 1910 it had been demonstrated to everybody connected with the business that it was a very dangerous thing to do.

Q. And yet no one had done anything about chang-

(Testimony of Robert F. Pillsbury.)

ing the method of carrying it, had they, Captain?

A. Yes, I think Mr. Bishop, as was testified, had taken it up.

Q. But that was not prior to 1910, was it, Captain?

A. Yes, I think it was.

Q. When was it, if you remember?

A. I do not remember but I think it would be 1909 anyway.

Q. Is it not a fact, Captain, that the "Dolbadarn Castle" was the first vessel in your experience that ever came into [107] San Francisco with a bulkhead of that character separating coke from general cargo?

A. No, I don't think so. I think the Frenchmen years ago had the ordinary wooden bulkheads.

Q. With matting?

A. The matting did not amount to anything.

Q. How long ago is that?

A. I saw the Frenchmen in the early part of 1900 with an ordinary wooden bulkhead as effective as that.

Q. But without any matting?

A. Well, I won't say that. I am inclined to believe they had sails on the aft part.

Q. Have you seen many of them, Captain?

A. I have seen quite a number, yes, sir.

Q. I mean at that time, in 1900.

A. Not 1900, in the early part of 1900. I came ashore in 1903. In those first years there was a great deal of trouble with those Frenchmen from various causes and I saw quite a good many of them.

(Testimony of Robert F. Pillsbury.)

Q. With the ventilators open was there not very little likelihood of damage from sweat?

A. No; a ventilator in one part of a compartment will not take care of the sweat.

Q. And yet she was a vessel of usual standard type, with ventilators used for the purpose of the trade she was in—you say that was her usual trade?

A. Yes.

Q. And those under ordinary circumstances would have been proper equipment for that vessel, would they not?

A. That was the equipment that she had doubtless.

Q. And for a cargo of coke stowed in wet or dry that would have been a proper equipment for that vessel, would it not, Captain?

A. Not with the experience that I have had, I would not say so.

Q. Which experience are you speaking of now, Captain, prior to 1910 or subsequently to 1910?

A. Yes, prior to 1910. [108]

Q. How would you attend to ventilating a vessel of that type?

A. In the first place, I would not put the coke in with the general cargo; I would not at that time. If I had done so I would have taken great care of the bulkheads and I would have provided suitable ventilation.

Q. How would you have provided other ventilation?

A. I would have provided ventilation on each end

(Testimony of Robert F. Pillsbury.)

of that compartment, of the general cargo compartment.

Q. Reaching the deck how?

A. Well, I would put a ventilator in the fore end of the general cargo compartment and one in the aft end.

Q. That would have meant reconstructing the vessel, would it not?

A. Well, that is not a very expensive thing to do.

Q. In the event of heavy weather how would you keep them open, Captain?

A. I would not keep them open in very heavy weather. I would put canvas covers on them.

Q. Captain, in your opinion, was the manner of stowage on the "Dolbadarn Castle" such as would have been approved in 1910 by a stevedore or master of ordinary skill and judgment knowing the voyage to be made and the weather and the conditions the vessel was likely to encounter on the way from Rotterdam to San Francisco?

A. I do not think I can answer that. My own opinion is I would not do it.

Q. I am speaking about the judgment of a stevedore or master of ordinary skill.

A. In my frame of mind I do not see how I can answer that question.

Q. You are rather leaning the other way, are you not, Captain?

Mr. HENGSTLER.—He would rather be on the careful side. [109]

Mr. LILLICK.—That is the captain's reputation,

(Testimony of Robert F. Pillsbury.)

and it is a good one. That is all.

Redirect Examination.

Mr. HENGSTLER.—Q. If there were not any separate air-tight bulkheads in connection with this cargo, would you call it good stowage? A. No.

Q. Captain, you have had the experience that a vessel has passed inspection by Lloyds, have you not, and nevertheless she was not seaworthy?

A. Well, that happens with all classifications; sometimes we fall down.

Q. What do you say as to matting being added here as a protection; what kind of a protection, if any, is that?

A. I do not think it is any protection.

Q. You do not think it amounts to anything, do you? A. No, sir.

Q. Is it not a fact that matting would probably only collect the more and contribute to it?

A. Well, I think it has rather a negative effect.

Recross-examination.

Mr. LILLICK.—Q. As I understand it, you would consider carrying general cargo and coke in the same vessel bad stowage anyway?

A. In the light of my experience, yes, Mr. Lillick, on that voyage.

[Testimony of Franklin Riffle, for Libelant.]

FRANKLIN RIFFLE, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Riffle, what is your business?

A. I am department manager in a wholesale hardware house, in charge of the iron and steel department of the Dunham, Carrigan & Hayden Company.
[110]

Q. Was that your business in 1910? A. It was.

Q. Do you recollect the consignment of steel plates or sheets received by you in August or September, 1910, ex ship “Dolbadarn Castle”? A. Yes, sir.

Q. With reference to those steel plates what was their nature so far as contact with outside substances or materials is concerned?

A. You refer to the condition of the plates when they arrived?

Q. You have had a good deal of experience with steel plates, have you not? A. Yes, sir.

Q. How long have you had experience with them?

A. Or, for a great many years. I have been connected with Dunham, Carrigan & Hayden Company as manager of that department for 13 years and I had had some experience prior to that as a civil engineer, a structural engineer.

Q. With that class of material?

A. With that class of material.

Q. Are they very susceptible to outside influence, things that come in contact with them?

A. Yes.

(Testimony of Franklin Riffle.)

Q. Why?

A. There are certain agencies that corrode steel by attacking the impurities in the steel, such as sulphur and phosphorus, forming chemical combinations which result in rust.

Q. What kind of rust do they result in?

A. It is what they call an iron oxide, disintegration of the steel forming an oxide of iron.

Q. With reference to the steel that came out of this ship and that you received, in what condition did it arrive?

A. Many of the plates were very badly corroded. The corrosion in some instances taking the form of a very thick incrustation [111] and in others a very light coating of rust; in nearly every instance the plates were pitted more or less as the result of this rust.

Q. Does the rust in itself impair the quality of the plates so that they become unmerchantable?

A. No. If there is no corrosion, if there is no pitting; fresh-water rust, for instance, does not injure plates.

Q. What makes them damaged, or injured, or unmerchantable?

A. The eating into the plate, forming pits or grooves.

Q. Did you examine the condition of these particular plates at the time? A. I did.

Q. What was that condition?

A. As I stated before, many of the plates were very badly corroded, covered with a coating of rust,

(Testimony of Franklin Riffle.)

and in some instances quite light, and a pale yellow color, and in other instances very thick and a dark color, almost black. In some instances I should say the rust was a quarter of an inch thick.

Q. What did you do with the plates?

A. We rejected those that were damaged.

Q. By damaged do you mean rusty?

A. I mean pitted.

The COURT.—Are you undertaking to show the cause of this or are you undertaking to show the extent of it?

Mr. HENGSTLER.—Both, your Honor.

The COURT.—The extent is not material here if this matter is to be referred to a Commissioner to ascertain the damages.

Mr. HENGSTLER.—It has something to do with the cause of it because the difference between rust and pitting is material.

The COURT.—He has testified it was pitted. If you will ascertain the cause of it we will make much better progress. [112]

Mr. HENGSTLER.—Q. If they had simply been slightly rusted, Mr. Riffle, would you have rejected them?

A. No. We accepted all the plates that were not pitted or damaged in any way after removing the rust, scraping it off. If we found the plates were not pitted we accepted them; in other words, we did not reject all the plates, a considerable portion of them.

Q. Where did you find those pits when you examined them in the rejected plates?

(Testimony of Franklin Riffle.)

A. In all parts of the plates; sometimes in one part and sometimes in another part, depending where the rust was.

Q. Were the pits confined to the edges or to the corners, or all over?

A. All over the plate; in the center as well as the sides and the edges.

Q. You have had experience with plates, have you not, that you knew to have been damaged by salt water?

A. Yes, we frequently have had plates damaged in that way.

Q. What conclusion did you come to with reference to the damage to these particular plates if you compared them with previous damage you had seen and that you knew to be damaged by salt water?

A. Well, I did not come to any conclusion for the reason that I did not know what the cause was. There was evidently some corrosive agency at work there but what it was I could not say.

Q. What showed to you the difference?

A. The principal difference that I noticed was that many of the plates had a much thicker incrustation than is usually the case with plates that we had brought around the Horn from New York, or by way of Panama and had been subjected to the action of salt water. That was about the only difference that I noticed. It seemed to me that the incrustation was rather [113] unusual in some instances, not in all instances.

(Testimony of Franklin Riffle.)

Cross-examination.

Mr. LILLICK.—Q. Were you the gentleman with whom Mr. Stewart talked when he went down to look at the plates? A. Is Mr. Stewart a chemist?

Q. He was a chemist down there.

A. I remember talking with a chemist who came down to get some samples of the rust.

Q. Were you here when Mr. Stewart testified a little while ago—earlier to-day?

A. No, I think not; at least I did not recognize any of the witnesses except Captain Pillsbury.

Q. You did not express any opinion to these gentlemen that the rust was from salt?

A. No, I think not, although I might have done so. We made the nitrate of silver test and there was evidently some salt present, though not in the proportion that we had been accustomed to find it in plates shipped via Panama. In other words, the reaction was very slight. It was some time after applying the nitrate of silver before there was any white color. It usually follows very quickly.

Q. How long had they been lying in your warehouse after delivery?

A. You mean before we rejected them?

Q. No, before the test was made?

A. I could not say, probably but a very few days. We rejected them promptly upon receipt.

Q. They were delivered to you by wagon from the ship to your place? A. Yes, by truck.

Q. And that was in September, 1910?

A. I believe so, yes, sir.

(Testimony of Bernard Hilding.)

Q. Do you remember whether it rained any during that week?

A. No, I do not; I don't remember that. [114]

[Testimony of Bernard Hilding, for Libellant.]

BERNARD HILDING, called for the libellant, sworn.

Mr. HENGSTLER—Q. Mr. Hilding, what is your business? A. I am in the importing business.

Q. What was your business in August, 1910?

A. I was in the importing department of Parrott & Company.

Q. Of the libellant in this case? A. Yes, sir.

Q. What connection did you have with the discharge, if any, of the "Dolbadarn Castle" in August, 1910?

A. Upon arrival of the ship I went to the dock and asked Captain Pillsbury to ascertain if there was any damage done to the cargo and if the ship was properly stowed.

Q. Was that within the scope of your business in Parrott & Company's firm? A. Yes, sir.

Q. You did that with every ship that arrived, you looked into the condition of the cargo?

A. Yes, sir, and I arranged for the discharging of the ship.

Q. Did you see the cargo yourself when it arrived?

A. Yes, sir.

Q. With reference to the cement, did you see that?

A. Yes, sir.

Q. Do you know where it was stowed?

(Testimony of Bernard Hilding.)

A. Yes, sir.

Q. And the steel plates, do you know where they were stowed? A. Yes, sir, I know.

Q. How were they stowed with reference to each other?

A. The cement was in amidships, below the hatch, and right through; then a small parcel of iron—

The COURT.—Just a moment. Here is a diagram showing the stowage; do you desire to contradict this?

Mr. HENGSTLER.—No, your Honor. [115]

The COURT.—Very well. It has been introduced in evidence and it shows the stowage, does it not?

Mr. HENGSTLER.—Yes, it is a rough sketch of it and it is substantially correct.

The COURT.—That seems to conform to the idea of the witnesses testifying heretofore.

Mr. HENGSTLER.—If it is admitted that the stowage was that way I will not go into that at all. The steel plates were below the cement.

Q. You noticed, did you not, that this general cargo was divided from the coke, which was in the forward and aft part of this vessel, by a bulkhead?

A. Yes, sir.

Q. Did you examine the bulkhead yourself?

A. I saw the bulkhead and I noticed that the boards in some places were not tight, so that in some places you could put your finger through. Furthermore, on top, right below the deck, there was a space probably in some places 3, 4 or 5 inches.

Q. Between the deck and the bulkhead?

(Testimony of Bernard Hilding.)

A. Between the deck and the bulkhead.

Q. What would you say with reference to its general condition as to tightness?

A. I would not consider it air-tight and I would think that moisture would come through freely, through a bulkhead as it was in that shape.

Q. Did you see any dunnage mats there?

A. I saw some; yes, sir.

Q. Where were they?

A. Some were found lying in the ship amongst the barrels of cement and some on the inside of the bulkhead.

Q. From the condition in which you saw them do you think they were instrumental in keeping out of that general cargo [116] compartment sweat or air or vapors?

A. I would not call those mats a lining of the bulkhead simply because it was not lined one next to the other; in some places they fell off.

Q. When you saw these mats, did they cover the whole bulkhead?

A. They did not. There were places where no mats were at all.

Q. You were here this afternoon when Captain Wilson was on the stand and described the double bulkhead, were you not? A. Yes, sir.

Q. Have you ever seen such a bulkhead in any vessel?

A. Yes, I have. In March, 1911—I am not sure of the date—there was a French sailing vessel consigned to us which had a bulkhead consisting of 2-

(Testimony of Bernard Hilding.)

inch boards; below those boards was old sacks; below that there was tar paper and again sacks, and then steel under it. In the same way it was separated on the side, and all around was coke. I know that the steel which was discharged there came out absolutely as clean as it had left the mill.

Q. You have had experience, have you not, with the stowing of coke in vessels, so far as having seen coke stowed in vessels is concerned? A. Yes, sir.

Q. And have you seen it discharged?

A. Yes, sir.

Q. What is your experience with coke?

A. My experience with coke is that it generally produces moisture, sweat—in the ship. If the general cargo is not properly separated it will result in damage to this cargo. I have seen coke which was as high as 10 per cent in moisture; I have particularly noticed that coke shipped during the winter season will generally show more moisture than coke shipped during the summer season.

Q. Why is that?

A. Because it has not got the chance to dry [117] out when leaving the coke-ovens up to the time of shipment.

Q. What is the action of coke-sweat upon cement, if you know?

A. Any kind of moisture coming in contact with cement will cake the cement.

Q. Would that apply to vapors of fresh water?

A. Fresh water, yes.

Q. Would it apply to vapors of salt water?

(Testimony of Bernard Hilding.)

A. Well, I am not a chemist but I should judge that vapors of salt water would act hardly different from fresh water because the salt would not evaporate; the vapor would be practically the same as soft water.

Q. It would apply to any vapor or to any sweat, it would damage the cement? A. Yes, sir.

Q. Do you know the action of coke on steel plate? Have you had any experience with that in the course of your employment in connection with vessels?

A. I have had some experience with steel plates, especially in this particular ship; I have had experience with sweat through coke on steel other than plates in many instances.

Q. What was the effect of the neighborhood of coke on steel, other than steel plates?

A. The steel which is subject to sweat caused through coke becomes rusty.

Q. Has that rust anything to do with the neighborhood of the coke?

A. The rust will be caused through the sweat of the coke, through the moisture.

Q. I believe you testified that this cement was caked that came out of the "Dolbadarn Castle"?

A. Yes, sir.

Q. What was the condition of the steel plates as they came out; did you see them?

A. Yes, sir, I saw them come out. I was in attendance on the ship every day. Some of the plates [118] were very rusty, covered with a thick rust, others again with a little yellow rust.

(Testimony of Bernard Hilding.)

Q. How was the rust distributed on the plates themselves?

A. The rust was all over, in practically all the plates, all the damaged plates.

Q. Did you notice which ones of the barrels of cement were damaged? Did you take any particular notice of that?

A. I could not say exactly which barrels of cement were damaged; I know that the first lot that came out of the ship was damaged, and I know that in the course of the sale many people—many buyers—objected to this particular cement as being damaged; as a matter of fact, one large buyer absolutely refused to take any of this cement at all because he claimed it was caked and damaged.

Cross-examination.

Mr. LILLICK.—Q. How old are you, Mr. Hilding?

A. Thirty-one and a half years old.

Q. When did you come to San Francisco?

A. I came in 1907.

Q. How long have you been working for Parrott & Company?

A. Since 1907, until February, 1913.

Q. Where were you employed before that?

A. I was in Mexico.

Q. Was your first experience with vessels that which you obtained here in San Francisco?

A. Yes, sir.

Q. How many vessels have you consigned to Parrott & Company that you personally saw that carried coke and general cargo?

(Testimony of Bernard Hilding.)

A. I should say offhand 7 or 8.

Q. How many before the "Dolbadarn Castle"?

A. The "Dolbadarn Castle" was the first sailing vessel, and we had one steamer before that.

Q. What day did you notice that the bulkhead did not come [119] within the span of your hand, as you seemed to indicate it, from the top of the deck?

A. Right on the very same day that I went down to the ship.

Q. Were the hatches off?

A. Yes, the hatches were off.

Q. Was any of the cement out of the vessel yet?

A. Not when I saw it first.

Q. How did you get down there?

A. I went down in the regular way; there was a ladder a few steps down; I went down and told Captain Pillsbury at the time to inspect the ship altogether.

Q. None of the cargo was out at all? A. No.

Q. How much room was there between the upper tier of cement and the deck? A. Very little.

Q. How much?

A. Well, I should say two or three feet roughly speaking.

Q. How did you examine the vessel, by candles, or by lamps, or what? A. Well, the hatches were off.

Q. Any preparation made at all other than taking the hatches off, to discharge the cargo? A. No.

Q. How did you get down below?

A. I did not go down below. I just was saying

(Testimony of Bernard Hilding.)

that the bulkhead below the deck showed that it was not tight.

Q. Is it not a fact you noticed that after the first tier of cement was out instead of at the first time you went down to the vessel?

A. To the best of my recollection no cargo had been discharged when I came down with Captain Pillsbury.

Q. And you noticed that the first time you went down there? A. Yes.

Q. In your examination of Mr. Hengstler I think you said you [120] had only had two vessels to your knowledge with coke and general cargo; am I mistaken about that?

A. That I had only what?

Q. That you had only two vessels with coke and general cargo?

A. No; I answered the question to you.

Q. What was it you said to Mr. Hengstler about *have* two vessels with coke?

A. Mr. Hengstler asked me if I had seen coke and general cargo in a ship where a proper bulkhead was built and I said I have seen one ship.

Q. What bulkheads were there on these 7 or 8 other vessels that you have had experience with?

A. When I said 7 or 8 other vessels, that included steamers also. Now, as to sailing vessels, there were perhaps four.

Q. What were the names of them?

A. The "Dolbadarn Castle" was one of them. The "Bidart" was another; and the "Sully"; I do

(Testimony of Bernard Hilding.)

not remember now whether there were 3 or 4.

Q. What kind of bulkheads did those four or did those three vessels have?

A. I know that the "Bidart" carried largely pebbles and coke, and on account of these bulkheads not being air-tight the stacks containing the pebbles were broken and the pebbles were practically loose and they all had to be re-sacked, for which the ship at the time paid.

Q. What kind of a bulkhead was there on her?

A. The boards were put side by side in a similar way as the "Dolbadarn Castle."

Q. What year was that in?

A. That was in 1911 I should judge, but I am not sure about that.

Q. What kind of a bulkhead did the other vessels have—for instance, the "Sully"?

A. The "Sully" had the bulkhead [121] which I just described to Mr. Hengstler, with 2-inch boards. The steel was stowed in the bottom of the ship, with 2-inch boards separating the coke from the steel, and below that two layers of tar paper and sacks.

Q. In what year was that?

A. That was approximately a year later than the "Dolbadarn Castle."

Q. In 1911 or 1912? A. I think so.

Q. Those three vessels then are the only three sailing vessels you have had any experience with?

A. No, I may say that I have been on board of other sailing vessels.

Q. When?

(Testimony of Bernard Hilding.)

A. During the period of my employment with Parrott & Company.

Q. Carrying coke and general cargo?

A. Yes, sir.

Q. What vessels were they?

A. I have been on board the "Bourbaki."

Q. To examine the cargo?

A. Not to examine the cargo. We have several parcels of merchandise on those ships, the ships were not consigned to us; I went to inspect those and I found there was no damage to our cargo.

Q. They carried coke? A. Yes, sir.

Q. And that is true of all the other vessels you have mentioned except the "Sully," the "Bidart" and the "Dolbadarn Castle," there was no damage on these other vessels? A. Except the "Bidart."

Q. Is it not a fact, Mr. Hilding, that when you went down to go over the "Dolbadarn Castle," and after you had gone over her cargo, you believed that that damage upon the plates was caused by niter?

A. No, that is not a fact; I did not at any time believe so.

Q. Are you acquainted with Mr. Bishop and Mr. Wright? [122] A. Yes, sir.

Q. Do you remember any conversation with Mr. Bishop about the previous cargo of this vessel?

A. Yes, sir, I do remember that.

Q. Do you remember now that you did speak to him about the previous cargo of the vessel being niter?

A. I had found out that the ship had carried niter

(Testimony of Bernard Hilding.)

and I wanted to find out if the rust could have come from salt or other causes owing to the ship not having been properly cleaned from the niter cargo.

Q. And you believed at that time that the damage was from salt, did you not?

A. No, I did not; if I had believed it was from salt it would not have been necessary to send a chemist to analyze it.

Q. Was there any mention made at all of sweat during the time that you were discussing this with Mr. Bishop? A. I do not remember that now.

Q. Mr. Hilding, this is your signature, is it not, upon this letter (handing)? A. Yes, sir.

Mr. LILLICK.—We just offer this in evidence, if your Honor please. I will not take the time to read it.

(The document was here marked “Claimant’s Exhibit No. 1.”)

Q. Now, going back to this question of niter, Mr. Hilding, are you clear in your mind about the situation with respect to examining that cargo for traces of niter?

A. Yes, sir. I have asked the chemist—I asked the chemist at the time to go down and inspect those plates, telling him also that niter had been in that ship, according to reports received by us, previous to this voyage.

Q. You did not think about the sweat at that time,—nothing was said about it?

A. I did not know the cause of the damage. [123]

Q. It never occurred to you that it was sweat?

(Testimony of Bernard Hilding.)

A. At that time?

Q. Yes.

A. At that time when I asked the chemist to go down we did not know what the cause of the damage was.

Q. What caused your inspection of this bulkhead then?

A. I had instructions from the firm and it was part of my duty whenever a ship came in to see that everything was in order, and generally I would employ a surveyor, especially when the cargo consisted of coke and general merchandise, and have the surveyor examine the vessel in order to know if there was any damage to the cargo, or not, and if the cargo was properly stowed, on account of several cases of damaged coke which came to my knowledge previous to this case of the "Dolbadarn Castle."

Q. I understood there were no other cases prior to the "Dolbadarn Castle" that you had any knowledge of? A. Personally I had not but we had reports.

Q. You did not say anything to Mr. Bishop about sweat, did you, or make any remarks about sweat at the time?

A. I have already answered that I asked the surveyor to inspect this particular cargo, and I asked the chemist. Personally, I am not a chemist and I cannot say if the damage was sweat or anything else.

Q. What I am getting at is this: You did not think about sweat as the cause of that damage when you went down there that day, did you?

A. I did see the bulkhead and I have testified as to

(Testimony of Bernard Hilding.)

the condition of the bulkhead, all prior to the discharge.

Q. Will you just answer my question? Answer it yes or no. [124]

A. When I went down that day I did not know whether there was any damage, or not; how could I expect there was sweat?

Mr. LILLICK.—Q. You did examine it with Captain Pillsbury, did you not? A. Yes, sir.

Q. And you found that the top tier of cement was caked, did you not? A. Yes, sir.

Q. Did you think at that time that that caking was caused by sweat? A. I didn't know.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Hilding, in this letter that has been introduced in evidence it is stated as follows—it is signed by Parrott & Company, apparently by yourself as Secretary:

“As indicated to you verbally a part of the cement delivered ex this vessel and a larger part of steel plates arrived in a damaged condition owing to improper stowage and poor ventilation; the damage done to the cement does not amount to a great deal and we therefore are inclined to waive any claim against the ship; the damaged plates however amount to”—and so on; was that letter written before or after the damage to the cement was ascertained?

A. At the time when this letter was written we only knew of a small portion of it, about 50 barrels of cement.

Q. Do you know whether a larger quantity of ce-

(Testimony of Bernard Hilding.)

ment was discovered later or not?

A. Yes, sir. We had one portion of 130 barrels of cement rejected by one buyer as all being caked. All through the sale of cement we had several complaints.

Q. Was that after the date of this letter?

A. It was after, as the cement was sold from the warehouse.

(An adjournment was here taken until to-morrow, Wednesday, November 19, 1913, at 9 A. M.) [125]

Wednesday, November 19, 1913.

[Testimony of Fred G. Wilson, for Libelant.]

FRED G. WILSON, called for the libelant, sworn.

Mr. HENGSTLER.—Q. What is your business, Captain Wilson?

A. I am vice-president of the Pacific Stevedoring & Ballasting Company, stevedores.

Q. What was your business in August and September, 1910? A. In the stevedore business.

Q. How long have you been in the stevedore business, Captain? A. 33 years.

Q. In this port all the time?

A. Always since I gave up going to sea, 33 years ago.

Q. You have had 33 years' experience in loading and discharging vessels? A. Yes.

Q. Do you remember the "Dolbadarn Castle," a British ship that came to this port in 1910?

A. I discharged her.

Q. Do you remember the barrels of cement that

(Testimony of Fred G. Wilson.)

were discharged from her? A. I do.

Q. When did you first see her?

A. On the day she docked on the south side of Howard street wharf.

Q. Before the hatches were off?

A. I was down in the hold as soon as they took the hatches off.

Q. What did you observe when you went down in the hold, Captain, with reference to these cement barrels?

A. I observed that by testing the riding tier of the cement that it was hard, and I reported the same to the captain.

Q. Did you at that time make an examination of the bulkheads that were separating the general merchandise from the coke?

A. Well, I saw that there were crevices in the bulkhead and [126] that the coke was in close proximity to the bulkhead.

Q. Do you remember what kind of a bulkhead it was, about what kind of boards they were?

A. Well, it might be $\frac{3}{4}$ of an inch or inch boards; I could not swear to that.

Q. But you say you saw crevices through the boards?

A. I saw that the bulkhead was not what we stevedores call a water-tight bulkhead.

Q. It was not a water-tight bulkhead?

A. No; that is, as far as I could see of it, what was in sight at the time.

Q. When you noticed that the cement barrels were

(Testimony of Fred G. Wilson.)

damaged did you associate that with the rest of the cargo at all?

A. I called the attention of the captain to it.

Q. You called the captain's attention to it. Did you associate it with stowage at all in any way?

Mr. LILLICK.—If your Honor please, I think that is calling for a conclusion of the witness, did you associate this?

The COURT.—Yes.

Mr. HENGSTLER.—Q. Did you come to any conclusion as to what was the cause of the damage to the cement as far as the appearances went?

A. The natural sequence of the stevedore would be a supposition it came from the sweat of the coke.

The COURT.—Q. Is that the conclusion you came to?

A. The conclusion I came to it was caused by the sweat that rises from the coke.

Mr. HENGSTLER.—Q. Have you seen many and discharged many vessels that carried coke in their hold?

A. Of course; I have discharged, I suppose 70 or 75% of the coke vessels that have been here in the last 20 years.

Q. What is the custom with reference to the bulkheads, presence or absence of bulkheads, when the vessel carries coke along with [127] general merchandise?

A. They generally have the bulkhead—the bulkhead is either clapboarded or in many cases they have, I have seen, used paper, where they have a

(Testimony of Fred G. Wilson.)

very perishable cargo, that would be damaged by the sweat.

Q. Was that the custom before 1910, or how far back can you say it has been the custom?

A. That has been the custom, I should say, well, about 1900 I think it was first started, Grace & Company used to be large importers and used to bring steel and other perishable cargo; they had the bulkheads in many cases lined with oil paper, common black oil paper.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. LILLICK.—Q. Captain Wilson, have you ever unloaded any cargoes for Meyer Wilson & Company?

A. Have I?

Q. Yes. A. About 70 per cent of them.

Q. They are very large importers of cement and coke in this port, are they not? A. Yes.

Q. They very frequently have vessels arrive and have had vessels with coke and cement both in them, have they not? A. Yes.

Q. Have you not frequently discharged cargo from vessels consigned to them with not only coke and cement in them, where there has been no bulkhead between the cement and the coke?

A. I have seen vessels come to Meyer Wilson & Company without bulkheads and correspondingly the cement was damaged.

Q. Have you never had a cargo come in without the cement damaged, when coke has been with it?

A. Yes, there have been some vessels come here

(Testimony of Fred G. Wilson.)

that the cargo was not damaged, but that was when the coke was shipped in the summer time. The German syndicate coke, when it is put into the ships dry, when it comes out of the oven and comes from the quarry or where they manufacture the coke, and [128] it comes through on the cars and they don't have any rain; but when a vessel is loaded in the month of March or April in Rotterdam or other points on the European coast where they have to bring the coke in open cars, why, frequently even if it is dry when it comes out of the oven, it gets wet from the rain.

Q. Isn't it a fact, however, that the probability of the coke sweating depends almost entirely on whether the coke is wet when it is put in the vessel?

A. If the coke is dry when it is put in the vessel, why there is a possibility, if the vessel is properly ventilated that there would not be any sweat.

Q. You knew Captain Baxter, did you not, the captain of the "Dolbardan Castle"?

A. I discharged the "Dolbardan Castle" when Captain Baxter was in here the voyage before, when she had another name; the ship was here formerly, two years before, under another name, and then she was sold to her present owners.

Q. What is your opinion or what was your opinion of Captain Baxter as a competent navigator?

A. Captain Baxter was a very able shipmaster.

Q. Would you say that Captain Baxter was also an able shipmaster as to his knowledge of stowing and stowage?

(Testimony of Fred G. Wilson.)

Mr. HENGSTLER.—I object to that, I don't think it is competent.

Mr. LILLICK.—If your Honor please, this witness is an expert and knew Mr. Baxter, and one of the vital points in this case is whether or not Captain Baxter was a competent shipmaster and whether or not he exercised proper care in stowing this cargo.

Mr. HENGSTLER.—Q. Have you ever seen him stow a vessel, Captain?

A. I don't know whether I am right in making these remarks. You take the majority of English ships where they have an overlooker [129] when the ship gets into port, the captain goes on his holiday, and the superintending of the loading is done by the overlooker, the ship's husband, and the captain in many cases leaves the ship when she arrives in port and goes to his family and comes back when the ship is loaded or the loading nearly completed.

Mr. LILLICK.—I ask that that remark be stricken out of the record.

The COURT.—Let that go out. It does not seem to me material whether he considered the captain was a competent loader, but did he load this vessel competently.

Mr. LILLICK.—And whether he loaded this vessel competently, I am going a step further than that. Captain Wilson, knowing Captain Baxter as he did, will be in a position to say whether or not Captain Wilson's inference as to this sweat as he stated upon his direct examination was the result of the coke—

The COURT.—(Intg.) That is to say, you are

(Testimony of Fred G. Wilson.)

going to prove the competency of one witness by another witness instead of by the man himself. The objection will be sustained.

Mr. LILLICK.—I don't know as I am getting exactly to the point your Honor has in mind, but it is this, but to make the point exactly, what I want to find out from Captain Wilson if I can is, that as Captain Baxter said this vessel was properly stowed, he was there when she was stowed, and that her hatches were opened when she was coming around the Horn. I want to find out from him whether it was sweat or not; I propose to take a chance asking Captain Wilson now because he knew Captain Baxter very well and knew he was a competent master. I have known Captain Wilson for a great many years, met him 10 or 15 years ago, and I have confidence in Captain Wilson, and I propose to ask Captain Wilson, with his knowledge of the "Dolbardan Castle" if Captain Baxter testified [130] as he did that he opened these hatches on the way around in good weather, that he never saw any evidences of sweat, and he took care of his cargo, whether in Captain Wilson's opinion that would not have been a sufficient offset to his inference that he drew when he went down into the cargo, where at that time there was no evidence of sweat, only the result of some moisture, that Captain Baxter was in a better position to judge whether this cement was damaged by sweat.

The COURT.—I understand. That is a matter for the Court and not for witness; that is the trouble

(Testimony of Fred G. Wilson.)

about that. The objection will be sustained.

Mr. LILLICK.—Q. Did you have a conversation with Captain Baxter about this cement or coke at the time?

A. I cannot remember the conversation I had with Captain Baxter, but I called his attention to the fact that I presumed that the damage to the riding tier of cement was caused by sweat from the coke; that is the natural sequence that would generally have happened in a cargo of cement, where, if the vessel sweats, it drops off the beams and iron deck of the vessel on to the cement.

Q. Captain, when you came to that conclusion, drew that inference as you say you did, did you have in mind the fact that the vessel had not only gone through severe storms but also had her seams opened and that had allowed salt water to go down into the hold?

A. That is a matter, Mr. Lillick, for the surveyor who looked after the vessel to test. You can test it, whether it is salt water or fresh water.

Q. I am asking you whether, and it is only this point I want from you, when you drew that inference about the cement you had in mind or had your attention called to the fact that the vessel had gone through heavy weather, and that was another explanation for the [131] damage, that is, that sea water had entered the hold.

A. To the best of my memory I did not know that that vessel came through—she might have, but I never knew—that she came through any worse than

(Testimony of Fred G. Wilson.)

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A. To the best of my memory I did not know that that vessel came through—she might have, but I never knew—that she came through any worse than

(Testimony of Fred G. Wilson.)

the ordinary weather we usually get off Cape Horn; the vessel was in good condition when she arrived here, and the stowage of the cargo was fine. The only thing that I remember is that I told the captain that the riding tier of the cement was damaged; and the sweat on the iron hoops was also perceptible, to be seen.

Q. Now, Captain, if as a matter of fact—I am only assuming this—if as a matter of fact the vessel had gone through heavy weather and through some means, salt water, ocean water had gone down into that hold, and run across the beams and leaked on those barrels, that would also have been an explanation for the rust on the hoops, would it not?

A. Yes, if the vessel had had very heavy weather and the decks leaked, that could be caused, of course. That is a matter that can be determined by the surveyor by taking this acid test, telling the difference between salt and fresh water.

Q. Captain, from your experience of cargoes that you have discharged here have you ever known of a vessel with steel sides, hull and a wooden deck, to have in it a water-tight, and by water-tight I mean air-tight compartment between coke and cement and steel plates, and general cargo?

A. Water-tight bulkheads?

Q. Yes.

A. I have known them as I say bulkheads to be put up paper lined, with oil paper, where they were carrying perishable cargo in close proximity with the coke.

(Testimony of Fred G. Wilson.)

Q. Isn't it true that in going around the Horn you meet with such weather that a compartment of that character would never be air-tight, the straining of the vessel would open that so that it could not be water-tight?

A. Well, a vessel, you [132] know, might have good weather; I have been around the Horn four or five times with very fine weather and again I have come around there sometimes with very bad weather.

Q. Now, Captain, would it be possible going through a storm down there to have a water-tight compartment—could there be a water-tight compartment in the vessel and it remain water-tight?

A. Well, in one of these steel vessels with the hull moving so much it might be possible, of course, for a bulkhead to break down, especially if it was not properly put up.

Q. Even beyond breaking down, would not the pitching and straining of the vessel absolutely make it impossible to have an air-tight compartment unless it was a part and parcel of the ship like a steel bulkhead in a vessel?

A. Yes, you might if she had extraordinary weather.

Q. What is your opinion about the "Dolbardan Castle" as she was then with respect to ventilators?

A. To what?

Q. Did you deem her ventilation proper?

A. Well, now, if I am to say about the ventilation, what ventilation she had, the only way that ship

(Testimony of Fred G. Wilson.)

could be properly ventilated would be in fine weather to take her hatches off, and undoubtedly those entries would be made in the log-book.

Q. If that be a fact you would consider that proper ventilation? If the log shows that her hatches were taken off in fine weather, you would consider she was properly ventilated?

A. I would consider if a man took off his hatches in fine weather in the Atlantic and again in the Pacific that he was doing all he could to protect the cargo from sweat.

Q. Now, assuming that the “Dolbarden Castle” had two ventilators in her forward hold, two in her after hold, and one amidships, with the accessory of the open hatches, what is your opinion [133] as to her ventilation?

A. She was well ventilated.

Mr. HENGSTLER.—I object to that. That would depend very much on the dimensions of the ventilators. In the first place his ventilators might be ridiculous, if the dimensions are small. The description is not sufficient to enable the witness to come to any conclusion on that.

Mr. LILLICK.—Captain Wilson from his experience in this port and from his experience from unloading and discharging vessels of the type of the “Dolbarden Castle” is able to speak with absolute certainty as to these ventilators because as I understand it from my own limited experience with these vessels—I will ask him this question:

Q. Are not these vessels of the type and size of

(Testimony of Fred G. Wilson.)

the "Dolbardan Castle" equipped usually with the same character of ventilators?

A. Well, to the best of my belief these vessels are not properly ventilated for carrying large cargoes of coke and cement and perishable iron; that is to the best of my belief. I mean for that class of vessel. The "Dolbardan Castle" was one of these unwieldy barks there that carry a very large cargo and as a rule a majority of sailing vessels do not have sufficient ventilation.

Q. Is that not something that is passed upon by Lloyds and the Bureau Veritas?

Mr. HENGSTLER.—If you know.

A. Well, I don't know whether that is usually passed upon. We generally calculate that the hatches have ample ventilating power for taking care of it in fine weather.

Mr. LILLICK.—Q. Don't all vessels going through the Tropics have a certain amount of sweat?

A. More or less; they have a certain amount.

[134]

Q. And if sweat permeated the cargo it would permeate the whole of the cargo would it not? It would not be confined to one particular locality?

A. Well, if a vessel, sweats, naturally the fumes rise from the coke, it would naturally be on the riding tier, or it might be down to the second tier.

Q. Am I right about sweat being moisture suspended in the atmosphere after it had evaporated, and then like a vapor?

(Testimony of Fred G. Wilson.)

A. It might permeate through the cargo, yes. It might do it.

Redirect Examination.

Mr. HENGSTLER.—Q. Captain, have you had experience as a navigator, have you ever been in command of vessels? Your business is that of stevedore, isn't it?

A. Yes. I have a certificate to take command of a vessel.

Mr. LILLICK.—I might ask the captain about this log-book, Mr. Hengstler.

Mr. HENGSTLER.—I do not mind if you ask any questions from him as to that.

Mr. LILLICK.—There is one point about the log-book: There are some different pages in this log-book which I propose to read into the record, and upon these pages appear, as upon this page I happen to have in my hand, two different kinds of ink. I want to be able to argue to your Honor, if any question is made about them, and I don't think there will be—

The COURT.—(Intg.) Can't you find out?

Mr. LILLICK.—It is in regard to the different ink used in it. The explanation of it is, the mate writes up the log and takes it to the master to countersign, and the captain goes over it with him, and if the captain sees something that he knows ought to be added, he says he didn't put down so and so and it is put down with the ink there. [135]

Mr. HENGSTLER.—The mate writes it with the other ink.

Mr. LILLICK.—Yes. In other words, that entry

(Testimony of G. Loken.)

in ink is really the entry of the mate at the dictation of the captain.

Mr. HENGSTLER.—I think probably that is a reasonable explanation. I have no desire to attack the log on that account.

[Testimony of G. Loken, for Libelant.]

G. LOKEN, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Loken, what is your business?

A. Manager of Henry Lund & Company.

Q. How long have you been in that business?

A. About 17 or 18 years.

Q. In the course of your business during the last 17 years it has been your function, has it not, to attend to the discharge of vessels that were consigned to your firm?

A. It has been under my supervision; yes.

Q. In accordance with that experience have you seen or observed vessels which arrived with cargoes of coke in connection with cargoes of general merchandise? A. Yes.

Q. In how many instances, generally speaking, as far as you remember?

A. Well, it would be hundreds of instances, I should say roughly.

Q. But you are familiar with coke cargoes, are you, Mr. Loken? A. Yes.

Q. Now, what is the nature of the coke cargo distinguishing it from other cargoes?

A. Coke cargoes have a certain amount of

(Testimony of G. Loken.)

moisture, and as a rule, generally speaking, it is very apt to damage other cargo in the course of long voyages.

Q. It would make a difference, would it not, as to whether the coke together with the general merchandise is carried in a steamer or [136] whether it is carried in a sailing vessel?

A. Very much; yes.

Q. Why?

A. A steamer is better ventilated than a sailer.

Q. Is there any other reason besides ventilation?

A. Shorter voyage.

Q. What is the average voyage of a steamer from Rotterdam to San Francisco?

A. 65 to 70 days for a steamer and 140 to 150 days for a sailer.

Q. Now, what effect has the moisture or has coke upon the rest of the cargo in the ship?

Mr. LILLICK.—If your Honor please, this is as to coke generally; we have already had testimony which has not been disputed and will not be disputed that coke carries some moisture. That has already been testified to.

Mr. HENGSTLER.—Will you admit that it carries usually an extraordinary amount of moisture?

Mr. LILLICK.—No.

Mr. HENGSTLER.—That is what I want to bring out here, that of course there is always a certain amount of sweat in every vessel, but what I want to show with this witness is that coke carries an extra-

(Testimony of G. Loken.)

ordinary amount of moisture.

Q. What with reference to the quantity of moisture in a vessel is expected when the vessel carries a coke cargo?

A. From our experience we find that the average coke cargo from the Continent arriving here will have from 6 to 8 per cent moisture.

Q. That is the average coke?

A. That is on an average.

Q. What allowance is made to the trade for moisture in coke, Mr. Loken, generally, if there is a rule about it in the trade?

A. There are some purchasers stipulate for a maximum amount, a maximum percentage of moisture in coke; that is amongst the larger purchasers; the smaller purchasers do not stipulate for any [137] percentage of moisture.

Q. Is there any usual percentage that is stipulated, Mr. Loken?

A. The largest buyers stipulate for a maximum of 3 per cent.

Q. He will accept it if it has only 3 per cent of moisture?

A. Three per cent is an allowance made for the excess.

Q. You have seen coke stowed in vessels, frequently, have you not in connection with other cargo? A. Yes.

Q. Now, what is necessary in order to protect other cargo from coke in a vessel, Mr. Loken?

Mr. LILLICK.—That is Mr. Loken's opinion.

(Testimony of G. Loken.)

Mr. HENGSTLER.—Certainly.

A. From experience.

Q. Based upon his experience of 17 years in observing hundreds of vessels that carried coke cargoes.

A. In my experience the only safe way to carry coke in a sailing vessel or in a steamer would be by bulkheading off the coke from the other cargo by good boards, battening it, and tar paper.

Q. If the boards are merely placed one placed upon the other, rough boards, without any battens would you consider that to be a proper bulkhead for the purpose of protecting general cargo from coke cargo?

A. I would not consider it a proper bulkhead if I wanted to be absolutely sure of the outcome of the cargo.

Q. You would expect with that kind of bulkhead the cargo would be damaged, would you not?

A. I would not say I would expect it to be damaged, but I would not want to take the risk that it would turn out in good order and condition.

Q. Mr. Loken, you have had experience in coke cargoes prior to 1910, have you not? A. Yes.

Q. What has been the custom with reference to protecting a general cargo from coke cargo prior to 1910, properly protect it?

A. The custom, that was left very much up to the vessel, to [138] protect their own vessel, but in certain instances where we knew we had iron and steel which attract moisture, and very susceptible to attracting moisture, why we gave special instruc-

(Testimony of G. Loken.)

tions in the loading of the vessel.

Q. Prior to 1910? A. Yes.

Q. How many instances, numerous instances, or how many?

A. Offhand, I should say numerous instances.

Cross-examination.

Mr. LILLICK.—Q. How many vessels during the time you have been with Henry Lund & Company have you seen consigned to Henry Lund & Company with steel and cement, coke and cement?

A. Well, I cannot come down to exact figures.

Q. Approximately?

A. I should say on an average of from about 8 to 10 steamers and sailers.

Q. How does the business of Henry Lund & Company as to consignments of coke and general cargo compare to that of Meyer Wilson & Company?

A. Well, I could not say for Meyer Wilson & Company, I am not attending to their business.

Q. But for Henry Lund & Company they have 8 to 10 vessels a year, are you prepared to say that?

A. That is roughly speaking.

Q. Is there any difference between a steamer and a sailing vessel with reference to the cargo hold, the bulkheads? A. Yes.

Q. How many sailing vessels during the time you mention have you had consigned to Henry Lund & Company that you have personally seen that had coke and cement?

A. As regards cement, we never dealt in cement very much, only occasionally.

(Testimony of G. Loken.)

Q. Coke and general cargo?

A. Coke and general cargo, I could not say off hand. I could get the records since the fire.

Q. Approximately, how many?

A. I have not the figures right at hand. [139]

Q. You said a few moments ago you had from 8 to 10 vessels a year, sailers and steamers?

A. That is approximately the number that we have coming to us with cargoes.

Q. Now, approximately what number of the 8 or 10 are sailers and what number steamers?

A. Well, I can give you, for instance, I can tell you what we have had this season.

Q. I am asking you over this period in which you say you have had 8 to 10 vessels a year approximately, if you can tell approximately how many of those were sailing vessels and how many steamers.

A. I should say about half and half.

Q. Half and half. How many of those vessels, of the sailing vessels, have you ever seen with a bulk-head such as you say should be put between coke and general cargo?

A. I have seen very few of them.

Q. Have you seen any?

A. No, I don't think I have.

Q. From the testimony that you gave a little while ago on your direct examination that the percentage of moisture in coke was 6 or 8 per cent, do you know that of your own knowledge? A. Yes.

Q. Have you tested it?

A. I have not tested it as a chemist; we have had

(Testimony of G. Loken.)

chemists test it for us.

Q. You are only speaking of what other men told you?

A. No; at my request the chemists have tested our cargoes of coke.

Q. That is upon what you base your testimony?

A. Yes.

Q. That there is 6 or 8 per cent of moisture?

A. Yes.

Q. In the coke? A. Yes.

Mr. LILLICK.—I move that that go out, if your Honor please.

The COURT.—Let it go out. The chemist is just as competent to tell us as to tell him.

Mr. HENGSTLER.—But, if your Honor please, if we are called upon to call the chemist in this particular instance to prove what is clearly the fact—
[140]

The COURT.—(Intg.) I understand; it is not competent. The objection is that it is hearsay—a chemist told him. What the chemist told him he could tell us, subject to cross-examination.

Mr. LILLICK.—Q. Mr. Loken, is it not a fact that steamers are better ventilated than sailing vessels?

A. Yes.

Q. You said that? A. Yes.

Q. Then there is a difference between the steamer cargoes as to coke and general cargo and the sailing vessels?

A. Steamers, as a rule, turn out a better cargo than sailers.

(Testimony of G. Loken.)

Q. Why is a steamer better ventilated than a sailing vessel, upon what do you base that conclusion?

A. A steamer is constructed with more ventilators in my opinion.

Q. How many ventilators were there on the "Dolbardan Castle"?

A. I was not down at the "Dolbardan Castle."

Q. Are you a man who is acquainted with vessels as to construction? A. No.

Q. You know practically nothing except what the ordinary man knows about a vessel and its construction?

A. Only as coming in contact with the shipping trade.

Q. That is what you base your conclusion upon as to ventilation?

A. Yes, and experience about general cargoes.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Loken, how many of the vessels have you examined for Henry Lund & Company that brought to this port cargoes of coke and steel?

A. Well, as I say, I am not prepared to go into exact figures, but quite a number of them.

Q. But your cargoes are usually coke in connection with steel, are they not, and not coke in connection with cement? A. Coke and steel generally.

Q. You do not import cement to any extent?

A. Oh, yes, we did, [141] prior to the fire and a little after the fire.

(Testimony of G. Loken.)

Q. But ordinarily you import coke and steel?

A. Coke and steel.

Q. Now, you say you never saw the kind of a bulkhead that you have described in answer to my question, what kind of a bulkhead would protect general cargo from come. Have you any explanation to make of that?

A. What you consider in my opinion would be a proper bulkhead.

The COURT.—You have given us that.

Mr. HENGSTLER.—You gave your opinion as to what would be a proper bulkhead.

A. Yes, I gave that.

Q. You said in answer to Mr. Lillick's question you had never seen that kind of a bulkhead; did you mean that?

A. No, I have never seen that exactly, that kind of a bulkhead.

Q. Have you seen bulkheads where the boards were battened between coke and general merchandise? A. Yes, I have seen that.

Q. Have you seen bulkheads where the boards were put one on top of the other and tar paper over them?

A. Yes, I have seen the cases where they have been tar papered and boards one on top of the other.

Q. Now, Mr. Loken, you have had experience, have you not, in the sale of these cokes that are consigned to your firm, Henry Lund & Company? A. Yes.

Q. For 17 years?

A. That is the length of my shipping experience.

(Testimony of G. Loken.)

As far as my experience in sales of coke go back, they go back to about 1900.

Q. You are familiar with the nature of coke through this experience, are you not? A. Yes.

Q. Through selling coke to your buyers?

A. Yes. [142]

Q. And you have done that since 1900 frequently, have you not? A. Yes.

Q. Can you testify that in all instances there is an allowance made for the moisture in the coke to large buyers?

A. Well, an allowance in moisture, that is only practically of recent date; it only goes back a few years; prior thereto there was no allowance for moisture made.

Q. But at the present day there is an allowance for moisture? A. To the larger buyers.

Recross-examination.

Mr. LILLICK.—Q. Will you name that vessel, Mr. Loken, where you have seen battens on the bulkheads, a sailing vessel?

A. The “R. C. Rickmers.”

Q. When?

A. I cannot tell you the exact date she was in port, but the vessel is very clear in my mind. I think it was in 1907 or 1908.

Q. Consigned to Henry Lund & Company?

A. Yes, consigned to Henry Lund & Company.

Q. What was her cargo?

A. Consisted mostly of iron and steel and coke.

(Testimony of G. Loken.)

Q. What was the name of the vessel that you saw the bulkhead made of boards and oil paper?

A. That was the "R. C. Rickmers."

Q. Did she also have these battens on the bulkheads?

A. Well, I don't know what you mean by battens exactly on the bulkhead.

Q. I understood that you testified to Mr. Hengstler that the bulkheads had battens on. Didn't you know what was meant by that when you answered his question?

A. What I meant by the battens was where the boards were battened, and the tar paper on the inside. [143]

Mr. LILLICK.—With Mr. Hengstler's permission, your Honor, I would like to put on a witness for our side out of order.

The COURT.—Very well.

[Testimony of H. L. E. Meyer, Jr., for Respondent.]

H. L. E. MEYER, Jr., called for the respondent, sworn.

Mr. LILLICK.—Q. Mr. Meyer, what is your business? A. Shipping and commission business.

Q. You are a member of the firm of Meyer Wilson & Company? A. Yes.

Q. How long has the firm and how long have you been receiving cargoes from sailing vessels loaded with coke and general cargo?

A. How long has the firm?

Q. Yes.

(Testimony of H. L. E. Meyer, Jr.)

A. You refer to the present copartnership of the firm of Meyer Wilson & Company.

Q. The firm of Meyer Wilson & Company.

A. Since 1881.

Q. Do you know in a general way how the business of Meyer Wilson & Company with reference to coke and the quantity of it compares with the business of all the other houses in San Francisco? A. Yes.

Q. How does it compare?

A. I think we do about as much as all the others do, probably a little more.

Q. Mr. Meyer, what has been your experience as to vessels, sailing vessels, arriving with coke and steel plates, with reference to the presence of sweat?

A. We have had ships arrive with coke and steel plates that were all in good order and condition, and we have had other vessels arrive where the plates were damaged.

Q. What has been the usual custom of the trade with reference to carrying coke and general cargo in combination in sailing vessels as to bulkheads and methods of building bulkheads? [144]

A. It has been the usual custom where the general cargo was subject to damage to build bulkheads on the ship.

Q. Of what type? A. Wooden bulkheads.

Q. With anything over the bulkhead or simply a wooden bulkhead?

A. Sometimes with mats over them on the inside.

Q. Have you ever heard of a case where these bulkheads have been made air-tight or water-tight?

(Testimony of H. L. E. Meyer, Jr.)

A. No, sir.

Q. You would notice it, would you not, if any cargo came here in that way?

A. Yes, I only wish they were water and air-tight sometimes.

Q. Have you ever heard of a case where a vessel came to San Francisco carrying such a cargo with oil paper over these bulkheads? A. No.

Q. In the cargoes consigned to Meyer Wilson & Company have you ever had steel plates and the coke in immediate proximity to each other? A. Yes.

Q. In what condition did that come in? Tell the Court from your experience what the situation is with respect to that.

A. Well, we have had some cargoes come in, as I said before, if the coke was dry and no water got into the ship, where the steel was in perfect condition when discharged here. We have had other cases where there might have been some leaks, were some leaks through the deck, where the water would go through the coke and settle on the plates, salt water, and the coke would be frozen to the steel and pit the steel very badly; we have had some very serious cases of that kind. If the coke when shipped is dry, unless water comes in contact with it, my experience has been that there is no damage to the steel from the coke. We have in fact in a good many ships found that ship owners in vessels where [145] there was not a laid between-decks had used our steel beams for making a deck and then put the coke on top of the beams without any separation whatsoever, and the

(Testimony of H. L. E. Meyer, Jr.)

ships have escaped in practically every instance all damage. I can only think of one case where there was a little damage owing to the fact that water had entered, and leaked on the coke and through the coke on to the steel.

Q. As I understand it, that is the case where the coke is piled upon the steel plates?

A. Right upon the steel.

Q. What has been the experience of Meyer Wilson & Company as to making an allowance for moisture to buyers for their coke?

A. You mean in coke sales?

Q. Yes, in coke sales.

A. I think we made one contract or possibly two contracts in our experience which had what we call a moisture clause in them; the only concern who buy or endeavor to buy with the moisture clause here is the Selby Smelting and Lead Company, and I have two cargoes of coke in port now for them, which we sold them without any moisture clause because we did not care to sell with that clause.

Q. Do you know whether any ships have arrived in port to-day? A. Yes.

Q. With coke and steel?

A. One of my ships arrived to-day and two yesterday.

Q. Do you know how that coke was stowed with reference to general cargo of the vessel?

A. It was stowed with the ordinary type of bulk-heads.

(Testimony of H. L. E. Meyer, Jr.)

Q. With the ordinary bulkheads, wooden bulkheads?

A. As a rule.

Q. Mr. Meyer, have you ever had any sailing vessels consigned to you where there have been cargo compartments where coke has been piled in the forward hold and in the after hold and general cargo amidships, whether steel plates, cement or anything of that character, where there have been no bulkheads between the coke and general cargo? [146]

A. Yes, where there have been cement amidships and coke.

Q. General cargoes; I simply mention cement as one.

A. We have had the ships arrive here without any bulkheads whatsoever.

Q. Have you ever had those arrive with no damage done?

A. Yes, even without damage, but also in some cases damaged. We have had cargoes where the coke,—take, for instance, coke and cement stowed next to one another, with simply mats laid over the end of the cement barrels, and we have had other cargoes with chalk stone and cliff stone, which contains a great deal of moisture with the cement stowed right up against it.

Q. Isn't it a fact that since you have mentioned chalk and cliff stone, that that is invariably put into the vessel in a damp condition, sometimes perfectly saturated with water?

A. It is shipped, as a rule, soaking wet.

(Testimony of H. L. E. Meyer, Jr.)

Q. And chalk stone is really a more dangerous cargo than coke, if you consider coke dangerous?

A. Yes, considerably so. Unless the coke is ringing wet in the ship owing to rainy weather, or something of that kind.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Meyer, you say the bulkheads between coke and general cargo that arrive in your vessels are not generally air-tight?

A. Yes.

Q. They are sometimes air-tight, are they not?

A. No, I have never known of a bulkhead in any sailing vessel to be air-tight, except the bulkhead happens to be a water-ballast tank, that the ship is one of those water-ballast ships that has tanks in the middle of it, that might be air-tight.

Q. But they are air-tight, and they would also be sweat-tight, would they not?

A. No, I think they sweat more than any other; [147] the sweat in these ballast tanks is a great deal more than any other place in the ship; that has been our experience.

Q. They sweat through the sides of the tank?

A. They sweat inside.

Q. But do they sweat outside?

A. The ship sweats outside too, naturally, outside of the tank.

Q. You say you wished they did have some air-tight and sweat-tight bulkheads in vessels which carried coke with general merchandise. That is your

(Testimony of H. L. E. Meyer, Jr.)

idea, is it? You wished they did. Why do you wish so?

A. Because it would do away with the chances of possible damage.

Q. You have collected a good many claims for damages, haven't you, for damages to general merchandise that was created just by this very cause of coke sweat?

A. Well, we have collected some, but under certain conditions only. I think I compromised a case with you, Doctor, on a vessel on which there was something similar, only the conditions were such that you decided to pay me rather than to go to court.

Q. But as a matter of fact, in your large experience you have had quite a number of claims for damage to general merchandise that came in these coke ships, haven't you?

A. Oh, yes. It has generally been because of the coke having been wet when shipped.

Q. Isn't it a fact that almost all the coke cargoes that arrive here arrive wet?

A. Not what I would call wet. There is more or less sweat with all coke cargoes; but we do not find that ordinary sweat makes the damage.

Q. What you mean by that is the ordinary coke sweat? A. The ordinary coke sweat.

Q. You know, however, that the ordinary coke sweat is an extraordinary amount of sweat as compared with other cargoes, don't you? [148]

A. With some classes of cargo.

Q. With most classes of cargo?

(Testimony of H. L. E. Meyer, Jr.)

A. With dry, perishable cargo, yes. We class cargoes like chalk stone and cliff stone and sand, in the same class, category; in fact, they are worse in my opinion than coke.

Q. There are some cargoes which are in the same category and they are all recognized to be dangerous cargoes to be loaded in ships, aren't they? They require special care? A. Naturally.

Q. When you say that you have received here steel that was stowed in connection with coke, directly in contact with it, and it was undamaged, cement and steel plates?

A. Steel beams; there might have been plates also.

Q. Steel beams are a very different thing from steel plates.

A. I think they are as liable to be damaged as steel plates or pretty nearly so.

Q. Are you sure about that? Steel plates are used for what purposes commercially, Mr. Meyer?

A. I guess they are used for various purposes.

Q. What purposes usually?

A. Making boilers and things.

Q. Supposing that a plate is to be used in a boiler and let us say that it is $\frac{3}{4}$ of an inch thick, if it is pitted to the depth of $\frac{1}{8}$ of an inch it is useless for a boiler, is it not? A. I assume so.

Q. Because that is the weakest part of the boiler, the whole boiler is $\frac{1}{8}$ of an inch thick in that case?

A. Yes, that is right.

Q. Do you know if a steel beam is pitted to the

(Testimony of H. L. E. Meyer, Jr.)

depth of $\frac{1}{8}$ of an inch that don't make any difference? A. No.

Q. It is just as good as it would be without that?

A. No, I would not agree with you. If the steel beam were pitted to the depth of $\frac{1}{8}$ of an inch it would be rejected. Such has [149] been my experience, ordinarily speaking, the buyers would not take it.

Q. Still a steel beam is not rejected as quick as a steel plate on account of rust?

A. No, I don't think so.

Q. Now, you spoke of the moisture clause. That moisture clause is very generally in contracts?

A. No, sir. The only people who I know of who insist upon the moisture clause are Selbys, or who try to insist upon it, but we sold them probably more coke than anybody else without the moisture clause than with the moisture clause.

Q. Do you sell to Selbys?

A. The Selby Smelting & Lead Company.

Q. Is your contract—

A. (Intg.) We have no moisture clause. I have two ships in port for them now.

Q. You say usually in their contract they have a moisture clause?

A. They endeavor to buy on the basis with a moisture guarantee in it.

Q. You simply sell to them without the moisture clause and take that into consideration in the price, don't you? A. Naturally.

Q. They are the largest importers of coke in this

(Testimony of H. L. E. Meyer, Jr.)

neighborhood? A. Not by any means.

Q. Isn't most of your business done with Selbys, most of your coke business? A. No.

Q. They are very large importers, are they not?

A. Not compared to some of our other customers; they are very small importers.

Q. Now, in those ships which arrived to-day and yesterday, what are their names, Mr. Meyer?

A. One is the "La Rochjauquilan" and the other the "La Rochefoucauld" with coke and steel on board.

Q. When did she arrive?

A. The "La Rochjauquilan" arrived yesterday and the "La Rochefoucauld" this morning. [150]

Q. Have you seen the "La Rochjauquilan"?

A. No.

Q. You don't know what condition her cargo is in, do you? A. No.

Q. What did she carry?

A. She carried coke, and steel and general cargo and sand.

Q. And as far as you know the steel may all be ruined in her?

A. I know nothing as to the condition of the steel.

Q. As far as the "La Rochefoucauld" is concerned, what is her cargo?

A. Steel, coke, sand and general cargo; she has a similar cargo on board.

Q. Have you looked at her stowage?

A. Well, she is going to Selbys about noon to-day.

(Testimony of H. L. E. Meyer, Jr.)

Redirect Examination.

Mr. LILLICK.—Q. What approximately is the percentage of the vessels in which you have had coke and general cargo consigned to you in which you have made claims for damage compared to those in which you have not made claims for damage?

A. That would be a very hard matter to answer.

The COURT.—A very hard matter, and not at all enlightening.

The COURT.—I will continue this until to-morrow morning at 9 o'clock.

(An adjournment was here taken until to-morrow, Thursday, November 20, 1913, at 9 A. M.) [151]

Thursday, November 20th, 1913.

[Testimony of P. W. Tompkins, for Libelant.]

P. W. TOMPKINS, called for the libelant, sworn.

Mr. HENGSTLER.—Q. What is your business?

A. Industrial Chemist.

Q. How long have you been engaged in that business? A. 17 years, about 17 years.

Q. Have you familiarized yourself in that business with the nature of coke, and particularly the action of coke in relation to steel plates and cement and merchandise which may be affected by the neighborhood of coke in the hold of ships?

A. Yes, sir, in a general way. Your question is rather broad. I am quite familiar with the character of coke and its influences, yes, sir.

Q. What is the character of coke with reference to absorbing and giving out moisture and gases?

A. They are very extensive; the surface being so

(Testimony of P. W. Tompkins.)

extensive and on account of its porous condition it enables it to absorb and give off very freely; it always contains a certain amount of moisture owing to the coking process itself.

Q. What do you mean by the coking process?

A. When the coke is made all the volatile substances are driven off, and at the time that that is completed the coking process is stopped by cleansing with water.

Mr. LILLICK.—Q. Just let me ask a question here: Have you ever seen coke prepared?

A. Yes, sir, I have.

Q. And you know how it is prepared, do you?

A. Oh, yes.

Mr. HENGSTLER.—Q. You say that in the process of manufacturing coke water is used and poured on the coke? A. Yes.

Q. In addition to the water are there any gases or chemical [152] substances absorbed by the coke that may react upon merchandise in the neighborhood of the coke?

A. There are some gases absorbed by the water; it has such a broad surface, principally carbon dioxide from the air and also oxygen from the air.

Q. That carbon dioxide and oxygen is absorbed in the coke along with the moisture, is it?

A. Yes, sir.

Q. If that coke is afterwards subjected to heat, what is the effect of the heat upon it?

A. Well, part of the gases involved up to the point of saturation at the temperature with which it is

(Testimony of P. W. Tompkins.)

given off are absorbed; the lower the temperature the more the absorption up to a certain point, and the higher the temperature the less it can absorb up to a certain point, up to the point of boiling water, and then it does not absorb any at all.

Q. With reference to the carbon dioxide that you testify to being absorbed by coke, what is the action of that carbon dioxide upon objects like steel plates?

A. Corrosion in conjunction with water.

Q. Did you, in August or September, 1910, examine the cement that came out of the hold of the British ship "Dolbadarn Castle"?

A. I examined the cement; I do not recall the date, though.

Mr. LILLICK.—Q. Do you know that that cement came out of the hold of the "Dolbadarn Castle"?

A. Do I know?

Q. Yes, do you know?

A. Of my own first knowledge, no, I do not.

Q. Where did you examine it?

A. In some warehouse down near Battery and Greenwich streets. I do not recall exactly the name of the warehouse. [153]

Q. Do you know how long it was after the vessel arrived in port?

A. That I do not know; I would have to refer to my report to know the exact date.

Q. Have you your report? I have no objection to your referring to it. A. No, I have not.

Mr. HENGSTLER.—Q. Is this your report, Mr. Tompkins? (Handing.)

(Testimony of P. W. Tompkins.)

A. Yes, sir, this is the report.

Q. What is the date of that report?

A. September 7, 1910.

Mr. LILLICK.—I would like to ask the witness one or two questions at this point.

Q. How many other barrels of cement were there in this lot that you examined?

A. I would not venture to say because it is so long ago.

Q. It was in a warehouse, was it?

A. Yes, sir, it was in a warehouse.

Q. Now you are speaking of the cement, are you?

A. Yes.

Q. Did someone tell you that the cement was the cement that came from the "Dolbadarn Castle"?

A. They say it was deposited there, it was at this warehouse and it had a certain mark.

Q. Do you know who told you that?

A. No, I do not recall.

Q. Where were the plates that you examined?

A. At the Dunham, Carrigan & Hayden warehouse.

Q. Was that upon the same day that you examined the cement?

A. I am not sure of that; I do not see that it refers to it here as being the same date, or not.

Q. Were there many other steel plates in that warehouse?

A. There may have been; I paid no attention other than to the ones I was drawn there to inspect.

Mr. LILLICK.—Mr. Hengstler, so far as you are

(Testimony of P. W. Tompkins.)

concerned [154] and so far as your client is concerned I do not want to put you to that proof, but there is this possibility, that someone down at these warehouses had a purpose in view to have Mr. Tompkins examine something else that came off the "Dolbadarn Castle"; what do you know about the situation yourself, Mr. Hengstler?

Mr. HENGSTLER.—I think I can prove by Mr. Bishop that he saw the chemist's report and that he knows that Mr. Tompkins examined both the cement and the steel plates that came from this ship.

Mr. LILLICK.—And yet no one can tell unless there was some special mark on them.

Mr. HENGSTLER.—Q. Mr. Tompkins, what was the mark on the cement?

A. Inspected at the Santa Fe Warehouse.

Q. Who requested you to make the investigation at the time?

A. It must have been Parrott & Company.

Q. Was anyone present when you inspected these goods?

A. I am of the opinion there was, but I am not clear on the point; I believe there was, but I am not sure.

Q. Do you remember who was present?

A. No, sir, I do not.

Q. Or who pointed them out to you?

A. No, sir, I do not.

Mr. HENGSTLER.—I will have to call other witnesses to prove that, your Honor.

Mr. LILLICK.—I do not want you to do that.

(Testimony of P. W. Tompkins.)

Let me see whether we cannot agree that Mr. Tompkins may testify he examined certain steel plates that he was told were plates that came from the "Dolbadarn Castle" and that he examined certain cement that he was told was cement that came from the "Dolbadarn Castle," [155] you could not prove it, I take it, because the cement undoubtedly was delivered to the warehouse by truck and your people did not follow it from one place to another.

Mr. HENGSTLER.—He was told by Parrott & Company, or by a representative of Parrott & Company—that these steel plates and that this cement came from the "Dolbadarn Castle."

Mr. LILLICK.—That he was told it came from the "Dolbadarn Castle," yes. I object to the witness' testimony, if your Honor please, upon the ground that the witness cannot testify that that was the plates or the cement that came from the "Dolbadarn Castle."

The COURT.—Of course that would require the bringing of somebody to make this connection.

Mr. HENGSTLER.—I will have to call somebody from the warehouse who knows about it. I thought that that was admitted. I thought all of you gentlemen had seen Mr. Tompkins' report.

Mr. LILLICK.—I have a copy of it. Upon the face of it, it simply shows that he was taken to this warehouse at least two weeks or perhaps a month after the vessel arrived and was told, here are the steel plates that came from the "Dolbadarn Castle"—he was told that at one warehouse, and he was

(Testimony of P. W. Tompkins.)

told at the other warehouse that here are the barrels of cement that came from the "Dolbadarn Castle," but that is all he knows about it.

Mr. HENGSTLER.—He was told that by a representative of Parrott & Company, and the report was accepted by you—

Mr. LILLICK.—Not by me. The report was sent to my people.

Mr. HENGSTLER.—You never before doubted that this was a report on these very goods, did you?
[156]

Mr. LILLICK.—No, I have not, and I have no doubt now but I think I ought to object to this testimony; I dislike to make it, but I think I ought to make the objection.

Mr. HENGSTLER.—I do not like to spin out this trial unnecessarily.

The COURT.—Do I understand you to state that you have no doubt but that these were the plates?

Mr. LILLICK.—No, I have not any doubt about it.

The COURT.—Then the Court will not have any doubt about it.

Mr. LILLICK.—Then let it go at that, your Honor.

The COURT.—Very well, proceed.

Mr. HENGSTLER.—Q. Mr. Tompkins, have you refreshed your memory from this report about the condition of these goods at the time?

A. Yes, sir, I think I have.

Q. What was the result of your examination of the cement?

A. That they were unmistakably not salt water

(Testimony of P. W. Tompkins.)

damaged; that they had been damaged by water of some kind.

The COURT.—Q. Do I understand you to say it was not by salt-water damage?

A. It was not by salt-water damage.

Mr. HENGSTLER.—Q. You examined the steel plates; will you kindly tell the court the result of your investigation of the damage to the steel plates?

A. The plates were chosen for the extent of the damage, and the entire surface of this plate washed and the water washes and the distilled water subjected to the characteristic clothing test which is the indirect determination of salt; in one instance there was one plate that gave indications of salt, and in the other a faint reaction that would be normal to anything that is tested in a commercial way; so that it gave positive and negative [157] information. Do you want me to refer to the other plates that were examined?

Q. Yes.

A. There was a third plate used for what we term scientifically a blank to find the relation to the normal salt, to salt that may have found access through salt water or any other extraneous source, and the amount in one of the rusted plates and the blank, one containing no particular amount of rust, were the same, so there would be normally a slight amount of salt in the undamaged plate and there was an excess of salt on a comparative basis on one of the damaged plates.

(Testimony of P. W. Tompkins.)

Q. Did you notice whether there was any pitting on the plates?

A. There was a great deal of pitting; I did not make that a special point but it was very evident.

Q. What conclusion did you come to with reference to the cause of the pitting?

A. That was, in conjunction with water, most likely, and carbon dioxide; carbon dioxide in the presence of water has a very corrosive effect.

Q. With reference to corrosiveness, is it one of the very corrosive agencies?

Mr. LILLICK.—I object to the form of the question, if your Honor please.

The COURT.—It is leading.

Mr. HENGSTLER.—Yes, it is a leading question but it is asked for the sake of saving time.

Q. What kind of an agency is it with reference to corrosiveness?

A. A very powerful agency. Probably a description of the properties of carbon dioxide might be more to the point, if that is permissible.

Q. You can explain anything on the subject you wish to.

A. Carbon dioxide is the agency by which all rocks are disintegrated [158] in the presence of water, and by its agency soluble salts are made. It is the principal agent which decomposes rock in the sense that they disintegrated into soil and into soluble salts when they are originally unsoluble. It is a very powerful solvent.

(Testimony of P. W. Tompkins.)

Cross-examination.

Mr. LILLICK.—Q. Salt is also a very corroding agency, is it not?

A. Yes, sir, under certain conditions.

Q. What is the temperature necessary to enable carbon dioxide in coke to be again released to the atmosphere?

A. Any advanced temperature to the point of saturation where it was originally absorbed.

Q. As I understood you on direct examination, you said it would at least have to come to a boiling point?

A. Oh, yes, that is, to liberate all.

Q. Would the heat have to be raised to the boiling point before the carbon dioxide would be released?

A. Oh, no, it is proportionate with any advanced temperature from whatever point of saturation it had originally.

Q. Is sulphur a chemical that could be released in the same way? A. Do you mean by a vapor?

Q. Yes, a rise in temperature.

A. And do you refer to coke?

Q. Yes.

A. I don't think so; I don't think any sulphur volatile compounds are in coke; they are all driven off.

Q. The carbon dioxide you have been referred to would only be carbon dioxide which the coke absorbed from the air itself?

A. The water; I think possibly there may be some formed during the coking process; when that is

(Testimony of P. W. Tompkins.)

carried on a little bit further that is what is known as water gas.

Q. Would not that be released both after the coking process [159] and the coke coming out of the red hot furnace?

A. No, the temperature is diminished and then it would be formed and dissolved by the water.

Q. Is there any great possibility of that being given off again by the coke?

A. No, except during advanced temperatures. When I say advanced temperatures, we were speaking of normal temperatures then; when coke goes into commercial use it is not at any high temperature.

Q. Would it not be rather a negligible quantity in vapor arising from coke?

A. No, it is quite a serious one.

Q. How much percentage of actual body of vapor given off is there?

A. I could not answer it in figures of that kind. At about 40 degrees Fahrenheit 100 volumes of water will absorb about 150 volumes of carbon dioxide, and at about 100 degrees Fahrenheit it will only absorb about 50; in other words, it would have released about 100 volumes, the water being heated 40 degrees to 100 degrees.

Q. Were you able to tell from your examination of the place whether or not carbon dioxide was a part of the deposit?

A. It would have left no residuum deposit, we did not examine for it anyway, we were only after salt.

Q. Yes, it was an afterthought. You could not

(Testimony of P. W. Tompkins.)

say whether the pitting or the rust on the steel plates was the result of salt or some other corroding agency, or carbon dioxide, could you, Mr. Tompkins?

A. You could to a certain extent. The pitting of the plate that was not salt damaged was not due to salt naturally.

Q. In your opinion it was not?

A. It could not have been because there was no salt there.

Q. As I understood you, one plate showed salt reaction? [160]

A. One did and one did not.

Q. How many did you examine? A. Three.

Q. Out of how many?

A. I haven't any idea. They were in piles.

Q. Were there not over 2,000?

A. I haven't any idea.

Q. And yet out of those piles these three were given you to make an examination?

A. No, I selected them myself.

Q. Selecting the ones showing the most—

A. (Intg.) The most marked evidences of water damage.

Q. And then a medium amount and then the least amount? A. No, the most amount in two cases.

Q. The most amount in two cases?

A. In two cases.

Q. How, as to the cement, how many barrels of cement were there in the warehouse?

A. I could not answer that.

Q. Did you pick out the barrels?

A. I just judged of the greatest amount of ex-

(Testimony of P. W. Tompkins.)

ternal water damage.

Q. How many of those barrels did you take?

A. Two barrels.

Q. Mr. Tompkins, you were told when you went to the plates, as well as to the cement, that they formed part of a cargo of a vessel that had coke in it, were you not? A. Yes, sir.

Q. Were you not also asked to determine from your examination of the plates and the cement whether or not there had been any niter in the vessel previous to the cargo it brought when it brought the cement and the plates? A. I was.

Q. Were you not also told that the cement and the plates were brought in the same cargo with coke, and the probability was that the damage was due to sweat?

A. I do not recall that I was instructed as to what the probable cause of the damage was; I may have been, but I do not recall it. [161]

Q. Would you say now that the report you made was not to some extent based upon the assumption that the damage was done by sweat?

A. I think the report speaks for itself.

Q. And the report so speaks, does it not?

A. That it must have been due largely to sweat.

Q. And in that report, did you not write as follows:

“Inasmuch as the steel plates and cement were stowed in the same vessel (Dolbadarn Castle) and in the same hatch, and that the plates were protected from below by steel bars,

(Testimony of P. W. Tompkins.)

and from the top by bars and the carrels of cement in question and some plates and cement show marked evidence of water damage, and the cement and staves, by the nature of the material, are capable of absorbing water in larger proportions than the steel plates, could retain by capillary attraction, it would be inferred that this damage, in spite of the indication on the one plate, is due to fresh water, or if such is not the case, that the conditions under which the steel plates have been exposed from the time they left the factory, are not the same conditions which surround the cement shipment.”

With that in view, Mr. Tompkins, and refreshing your recollection to that extent, would you not say that to some extent at least the report you made was based upon statements made to you about how the cement and the plates were stowed?

A. I have no first-hand knowledge of how it was stowed.

Q. And yet your deduction was based to some extent upon that as the report itself states?

A. Yes, that is self-evident.

Q. In the report you were properly careful about also stating that the plates might have been damaged in the shipment from the factory to the vessel; what is the situation about that? [162]

A. Well, salt could come from almost every source if the plate were by any chance wetted with fresh water.

Q. And the plates might also have been damaged

(Testimony of P. W. Tompkins.)

during the course of the trip from the factory to the vessel by carbon dioxide?

A. If they were wetted; yes, sir.

Q. If it be the fact that these steel plates were when received by the vessel in a damaged condition and were more or less rusty when received by the vessel and before being put in the hold, you would think that an important factor, would you not, as to the cause of the rust?

Mr. HENGSTLER.—If your Honor please, the expression “damaged condition” is not proper in the question.

Mr. LILLICK.—I will have the words “damaged condition” go out of the question and let the question be read to the witness. I will say, in a more or less rusty condition.

(The question as amended, was here repeated by the Reporter.)

A. Well, if they were rusty before they got into the vessel it would be an important factor as to their rusty condition; yes, sir.

Q. I notice in your report you also have used the language, reading from the first page:

“One plate, very badly rusted (red glossy and amorphous rust) showing pronounced water marks, was washed with distilled water and the filtered washings gave a marked reaction for salt.”

Is not red rust a distinguishing mark of salt rust?

A. Oh, no; there is no distinguishing mark. Salt does not show anything about the character of the rust.

(Testimony of P. W. Tompkins.)

Q. You cannot tell from the inspection and without a natural [163] chemical test whether or not the rust is rust caused by some salt substance or some other chemical?

A. You cannot tell what the cause is. Rust is an oxide of iron and unless it has left some residuum effect from the cause you cannot determine it.

Q. It was trying to get a distinguishing feature as between the pitting from the salt and the pitting from carbon dioxide or some other chemical.

A. That I could not answer.

Q. What does the word "amorphous" mean?

A. It means sort of a nondescript and conglomerate mass.

Q. And without any crystalline deposit?

A. Yes.

Q. Would it not be possible, Mr. Tompkins, for a rust to have been caused upon these steel plates by reason of damage done to them from sweat or vapor that arose through salt water having found its way into that hold and thereafter having been released into the atmosphere by reason of heat through which the vessel passed? A. Yes, sir.

Q. In other words, upon those plates that showed no reaction of salt the rust upon those plates may have been the result of sweat from salt water that had been deposited in that hold?

A. Yes, but not exclusively.

Q. The point I am particularly directing your judgment to is the fact that sweat is ordinarily a deposit of water which has been held in solution in the

(Testimony of P. W. Tompkins.)

atmosphere and thereafter by coming in contact with some cold substance has again formed into drops and is released? A. It condenses.

Q. Yes, condenses and then drops again?

A. Yes.

Q. In a situation of the sort here as where this material was in the hold of the vessel, salt water having been injected [164] into that hold, heated and arising in the form of a vapor would leave behind it the salt and thereafter be deposited in a clear state upon the other plates; that might be an explanation for the reaction upon the plates that showed no salt reaction, would it not?

A. I think that is a little involved; I cannot understand it.

The COURT.—Let me put it to you in a little simpler form.

Q. The salt water evaporating leaves the salt behind, does it not? A. Yes, sir.

Q. If the vapor is then condensed and turns to the plates, the plates would show no reaction of the salt thereafter, would they? A. That is correct.

Mr. LILLICK.—Q. Again, referring to your report, Mr. Tompkins, you have closed it, at the very bottom of the page the last paragraph, with the following words:

“In conclusion, we may state, that all matters being considered, the predominating evidence is against the supposition that the iron plates have been damaged by salt water, whereas in the cement there is no doubt in the fact that fresh water

(Testimony of P. W. Tompkins.)

damage alone has been responsible for the condition of the barrels examined, and may be due to either direct contact with fresh water or to an excessive sweating of the coke cargo (a dangerous factor in this connection), or to both conditions combined."

All through the report that you have made upon this examination, Mr. Tompkins, you had in mind the fact that this cement and that these plates were carried as a part of a cargo of a vessel that also had a large proportion of coke in it, had you not?

A. That is correct. [165]

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Tompkins, from the whole examination you made did you come to the conclusion that the pits created upon these steel plates were made by sweat arising from salt water?

A. Well, I cannot say that the conclusion at the time had anything to do with the pitting of the plates at all. There was a distinction between salt damage and fresh damage. But if that question is asked here, and I am asked what my views are regarding it, it is something outside the report, but my views regarding the pitting are that the coke must have been a very potent factor in the cause of pitting.

Q. This carbon dioxide which is liberated from the coke, how does its corrosive quality compare with the corrosive quality of salt water?

A. Well, salt water in itself cannot contain as much carbon dioxide as pure water can, and so for that reason alone the amount that could be released

(Testimony of P. W. Tompkins.)

from salt water would be minimized. The saturation point of salt water is much lower in carbon dioxide than of fresh water.

Q. You have frequently examined cargoes that have come out of ships, have you not—chemically?

A. Yes, sir.

Q. You find some salt water reaction always in anything that comes out of a vessel, do you not?

A. It depends entirely on the cargo. Some have a great amount of salt and others have less; it depends on the character of the material.

[Testimony of H. L. Van Winkle, for Libelant.]

H. L. VAN WINKLE, called for the libelant, sworn.

Mr. HENGSTLER.—Q. What is your business?

[166] A. I am an importer of iron and steel.

Q. How long have you been engaged in that business? A. 35 years.

Q. You are familiar with different kinds of steel now being imported here?

A. Yes, steel of every description.

Q. Do you know the distinction between steel bars and steel plates? A. I do.

Q. With reference to sensitiveness as to outside influences, how do steel bars compare with steel plates?

A. Owing to a steel plate having a very much larger surface it is very much more susceptible than a bar, which has a small round surface, or a flat one, a flat and smooth surface, attracting very little moisture.

(Testimony of H. L. Van Winkle.)

Q. You saw the steel plates that came out of the "Dolbadarn Castle," did you not? A. I did.

Q. Where did you see them first?

A. I sold the plates originally to the Dunham, Carrigan Company. On their arrival on the "Dolbadarn Castle" I went down to the vessel and saw them on the dock.

Q. Were you interested in them in any way?

A. I sold them. I went to the dock and saw them on the dock. I saw that they were rusty. Mr. Riffle told me that the plates were rusty and he was going to reject 185 tons. I went to Dunham, Carrigan & Haydens to see the plates. I recognized the plates right away; they were peculiarly marked "D. C. H. Co., S. F." with a yellow mark. They were all marked that way. I positively identified them as the plates I saw on the dock.

Q. Do you happen to know whether the chemist who testified here picked out his particular specimens from these particular plates? [167]

A. From those piles, yes.

Q. Were you present at the time?

A. No, sir, I was not, but Mr. Riffle told me he had given him plates from those piles. I saw the test myself, the silver test on the plates. The rust was very thick and black. He made the test on the plates. I saw the reaction in some; in some there was only a trace.

Q. In the course of your experience you have become familiar, have you not, with the kind of damage which salt water makes upon steel plates?

(Testimony of H. L. Van Winkle.)

A. Yes, sir.

Q. How did the damage on these particular steel plates compare with the damage which you have known to be created by salt water on steel plates?

A. It seemed to be very much different in that the rust was very black; it was rather different in appearance as salt water rust is rather yellow; this being entirely of a different nature it attracted my attention.

Cross-examination.

Mr. LILLICK.—Q. Did you hear Mr. Tompkins testify a few minutes ago that salt water rust had no marked distinction from other kinds of rust, in color?

A. Well, he means from other kinds of water. I heard his testimony and I understood it. You take fresh water and you take salt water and throw them on a plate it will give about the same color of rust. That is what he meant.

Q. You are interested with Parrott & Company, are you? A. No, sir.

Q. Were not these steel plates consigned to Parrott & Company? A. Yes, sir.

Q. What is the connection by your having sold the steel plates and the consignment being to Parrott & Company? [168]

A. I sell the plates, Parrott & Company imports them. I turn the orders over to Parrott & Company. They charter the vessel and attend to bringing out the cargo. I do the selling of all the steel for Parrott & Company.

Q. Then Parrott & Company were representing

(Testimony of H. L. Van Winkle.)

you in the transaction? You gave them the order for steel plates and they sent the order on and had the shipment made up, and got the vessel, and so forth?

A. Not exactly. I acted as a broker. I sell the plates and turn the business over to Parrott & Company and they do the business for themselves and not for me.

Q. Will Parrott & Company lose anything on this transaction if the plates are rejected?

A. Why certainly, they will lose it all. We had to take the plates from the Dunham, Carrigan Company; they were not delivered in merchantable condition; we had to sell them for practically nothing—for $11\frac{1}{2}$ cents a lb. They were practically given away for less than cost, less than they cost in the mill. They were useless; you could not put them into anything. It was to be used for boilers. They were so badly pitted they could not be used; it was like a chain, the weakest link is the strength of the chain.

Q. How long were they on the dock?

A. Just two days; they hauled them Saturday and Monday; Sunday intervened.

Q. Where did they go?

A. Right to the warehouse; I saw them rolled in.

Q. How long did it take to deliver the steel?

A. It takes one hour and 15 minutes for a trip from the dock to their warehouse.

Q. How long did it take to deliver the entire load?

A. Well, there were 1068 plates and it took two days. [169]

(Testimony of H. L. Van Winkle.)

Q. Were there not some 2700 plates?

A. No, sir; 1068.

Mr. HENGSTLER.—We rest our case, your Honor.

Mr. LILLICK.—I have not offered the depositions in evidence yet, if your Honor please; I offer the depositions of John Baxter, John Owens, Jan Olson, Robert Canchar.

Now, I desire to read into the record certain portions of the log, as follows: Under date of March 12th:

[Excerpts from Log.]

“Midnight; fine breeze & clear; men employed in various jobs; pumps, lights and lookout attended; fore & after hatches kept open at every opportunity to ventilate the hold night and day.

April 8th, 1910. Noon; fine breeze & clear; fore & after hatches kept open to ventilate the hold.

April 14th. Opened the main hatch to ventilate the hold.”

That was at 2 P. M.

“April 16th, 1910, 2 P. M. Calm, main hatch kept open at every opportunity to ventilate the hold.”

Mr. HENGSTLER.—May I interrupt you just a minute, Mr. Lillick? If your Honor please, there is no objection to reading all these entries into the record from the log-book, but I think the law is settled that these entries are not proper evidence upon

the ground that they are self-serving. The log-book cannot be offered in evidence by the ship. If there is any portion of it which I can discover which is opposed to the interests of the ship, then it is properly admissible in evidence; but no entry made by these people—self-serving—is admissible in evidence at all. But I have no objection to the whole log being read into evidence. [170]

Mr. LILLICK.—I want to read it in, also to refresh your recollection, Mr. Hengstler, we stipulated upon the taking of the deposition that either party might read the log and might use it in evidence. Don't you remember that we stipulated that the logs might be used in evidence?

Mr. HENGSTLER.—I do not think that that was meant to be anything except so far as the evidence might be admissible. You could not prove these things by the witnesses even if it was offered in the depositions at the time.

Mr. LILLICK.—But for the purposes of your own case you were willing to stipulate with me that the log-books might be offered in evidence, and you did stipulate that the log-books might be offered in evidence on the trial by either party.

Mr. HENGSTLER.—Yes, that they might be offered in so far as the entries in the log-book were admissible.

Mr. LILLICK.—I don't think that was put in; it might have been, but I don't think so.

Mr. HENGSTLER.—Well, it might save time to read them now and then we can thresh that matter out between us afterwards.

Mr. LILLICK.—The next is June 20, 1910.

“Fine breeze & clear; fore & aft hatches kept open night & day at every opportunity to ventilate the hold.”

The next is:

“March 4th: Moderate gale with heavy westerly sea; ship diving heavy & shipping heavy water.”

The next is March 10th:

“Strong breeze with squalls; at 1 P. M., took in all small sail & main topmast staysail; at 2:30 heavy hail squall; took in upper topgallant sails at 3 A. M., the clew-iron of the main lower topgallant sail carried away [171] & the sail flap to pieces; took in the foreone; noon, strong gale & high sea; ship shipping heavy water; p. m. less wind at 4 p. m. bent another main topgallant sail & set it & the fore one; midnight, fine breeze & clear with heavy N. W. sea; all sail set; pumps, lights & lookout attended.”

The next is May 3rd:

“Strong breeze & overcast; at 3–30 a. m. set the main sail. Strong breeze with squalls at 8 a. m. took in the main sail. Noon, strong wind & heavy sea. Strong wind at 2 p. m. Set reef mainsail; 5 p. m. heavy squall; took in fore & main lower topgallant sails & main sail; strong wind; midnight, moderate gale & high sea, pumps, lights & lookout attended.”

The next is May 4:

“Strong gale & high sea; ship labouring heavy & shipping heavy water; fore & after hatches had

to be batteneed down; main ventilator covered up to prevent seas getting below. Noon, strong gale. Ditto. Ditto at 6 p. m. took in upper topsails & jib; ship labouring heavy & shipping heavy water; midnight, heavy gale & high sea; pumps, lights & lookout attended."

The next is Thursday, May 5th:

"Heavy gale with terrific squalls; at 1-30 a. m. took in foresail; ship labouring & straining heavy and shipping heavy seas; at 7 a. m. mountainous sea came over the bow; broke top of both lighthouses and glasses, also broke diaptric glass of port sidelight, tore the belfrey from its fastenings on forecastle head, the bell unshipped and went overboard through one of the ports; some pieces of belfrey picked up; the bell scraped a large hole in one of the deck planks and the belfrey 2" into another plank; the wave burst inner jib and foretopmast at staysail and they went to [172] ribbons; lost downhoul, halyards, &c. at the same time carried away.

"Friday 6th May, 1910: Inner jib stay which went through fore lower topsail carrying away footrope of sail which went to ribbons immediately with buntlines, clewlines and blocks attached; it was now blowing a perfect hurricane; ship under main lower topsail with lee-sheet slacked off; the inner jib stay cast adrift port side of fore upper topsail and that side of sail was lost with gear and blocks; they stay did also much damage to service on standing rigging; the wire foot of lower topsail cut the foresail

which was fast so badly that it will take several bolts of canvas to repair it; the buntlines were also cut, remains of jib and staysail halyards came on deck one on each side and got foul of fore braces and fore topsail braces, the wire cutting them so much that new ones had to be rove; they were only rove new the week before; washed away outside chocks of lifeboat and smashed bridge from poop to top of house. W. C. door. which was 1 1-2 solid teak smashed, washed gratings from skylight on poop and two went overboard; shipped heavy seas on poop and a lot of water got into cabin & sail-locker; one plate between rudder and stern-post washed away; gammoning-band on bowsprit torn from fastening above the stem; secured the bowsprit with chain passed round the stem; the bowsprit seems to have come in slightly as the plate on fore part of forepeak hatch where heel of bowsprit comes in bulged aft; found both lugs of band on foremast where maintopmast spring stay is set up to cracked.

“Saturday 7th May: 1910. Calm & overcast. 6 a. m. breeze sprung up from the N. W. bent upper fore topsail; noon, strong [173] breeze & veering to the westward, all sail set.”

The next is:

“May 8th: Moderate gale with high sea; ship shipping heavy water. Ditto. 8 a. m. wear ship to the southward; 10 wear ship to W NW; noon, strong wind. ditto at 4 wear ship to southward; 5 p. m. wear ship to the westward, wind veering

to the S SW; midnight, strong wind with heavy squalls, ship labouring heavy & shipping heavy water, pumps, lights & lookout attended."

The next is:

"May 17th. Moderate gale & high sea; ship shipping heavy water; 4 a. m. wind veering to the S. W. with squalls. Noon, moderate gale. Ditto at 2 p. m. sighted the land, Staten Island at 4-30 sighted New Year Island light, at 10 p. m. off Cape St. John."

The next is:

"May 19th. Strong breeze & variable with rain 8 p. m. took in fore & main topgallant sails & main sail; 10 p. m. took in fore upper topsail. Midnight, heavy gale & high sea, ship shipping heavy water, pumps, lights & lookout attended."

The next is May 20th:

"Heavy gale & high sea, took in main upper topsail, ship labouring & straining heavy & shipping heavy water; at 4 a. m. wind veer to the southwest & falling light ship rolling heavy; 8 a. m. wear ship to the westward, set upper topsails & lower topgallant sails; noon, set main sail; strong breeze & heavy head sea with snow squalls; at 4 p. m. set upper topgallant sails; midnight, wear ship to the S SE, wind veering to the westward."

Mr. HENGSTLER.—You do not claim that these are very heavy gales to encounter coming around the Horn, do you?

Mr. LILLICK.—No, but I claim the ship was laboring in the sea, shipping heavy seas, and the

decks were awash. [174]

The next is:

“May 22, 1910. Moderate gale with high sea; ship labouring & straining heavy & shipping heavy water; 8 a. m. less wind & veering to the N NW, set main sail & main lower topgallant sail. Noon, strong wind & heavy sea, ship shipping heavy water. P. M. ditto; at 8 p. m. took in main sail. Midnight, strong wind & heavy S W sea; ship labouring & shipping heavy water, wind bucking to the northward.”

The next is:

“May 23: Moderate breeze & overcast, set mainsail & lower foretopsail & lower foretopgallant sail, heavy S W sea, ship shipping heavy water. Noon, strong breeze with rain; p. m. ditto, at 6 p. m. took in fore lower topgallant sail. Midnight, strong wind & high sea; pumps, lights & lookout attended, fore & after hatches had to be battened down also main ventilator covered up to prevent seas getting below.”

The next is:

“May 24: Moderate gale with high sea, ship labouring & straining heavy & shipping heavy water; at 3 p. m. took in main sail & main lower topgallant sail; at 7 a. m. wind chop round to the S W, strong; noon heavy gale with snow squalls; p. m. moderate gale with snow squalls; at 6 p. m. set main sail; 10, set lower topgallant sail. Midnight, moderate gale, ship labouring heavy & shipping heavy water; pumps, lights & lookout attended.”

The next is:

“May 25: Moderate gale & high sea, with snow squalls; ditto; noon, moderate gale with heavy snow squalls; took in lower topgallant sails; heavy snow squalls, ship labouring & straining heavy & shipping heavy water; ditto midnight, moderate gale with rain squalls.”

The next is:

“May 26: Moderate gale with high sea, ship [175] labouring & straining heavy & shipping heavy water; ditto; noon, moderate gale, wind veering westerly; strong wind with drizzle rain; ditto; midnight, less wind, wear ship to the southward.”

The next is:

“May 27: Light wind & heavy sea, with drizzle rain; strong breeze with thick rain; at 7 a. m. took in main sail & inner jib; noon, wind chop round to the southward; light wind & variable with showers & heavy sea, ship rolling heavy.”

The next is:

“May 29th: Strong breeze with heavy cross sea; 4 a. m. took in mainsail; at 7 took in main lower topgallant sail; ditto; noon, strong breeze with rain; ditto; ditto; midnight, strong breeze with showers of rain.”

The next is:

“May 30: Strong wind with heavy sea, ship labouring & straining heavy; ditto at 7 a. m. wind chop to the S SW set main sail & lower topgallant sails; noon, strong wind & heavy cross sea, ship shipping heavy water.”

The next is:

“August 2nd: Strong breeze & overcast, with heavy head sea, took in all small sails; ditto at 9 a. m. took in upper topgallant sail. Noon; strong breeze & heavy sea with the plugs out of the hawse-pipe and the ship diving heavily; great quantity of water coming through; found forepeak hatch where bowsprit comes against leaking badly secured it temporary; ditto; mid-night, strong breeze with haze & overcast sky; men employed in various jobs.”

The next is:

“August 3rd: During the passage main hatches were taken off in fine weather to ventilate hold; the fore & after hatches were kept off at all time except when forced to batten them down in bad weather.”

They arrived in San Francisco the next day. I want to [176] put this in to show the date of the arrival.

The next is:

“August 4th: Light wind from the westward with haze & drizzle; rain at 5-30 a. m. the quarantine doctor came on board, the pilot left noon.”

WE REST.

(The cause was here continued until Saturday, November 22, 1913, at 9 A. M. for argument.)

[Endorsed]: Filed Feb. 10, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [177]

*In the District Court of the United States in and for
the Northern District of California.*

PARROTT & COMPANY (a Corporation),
Libelant,

vs.

The British Ship "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

Depositions [of John Baxter et al. for Respondent.]

BE IT REMEMBERED that on Thursday, September 15th, 1910, and Friday, September 16th, 1910, pursuant to stipulation of counsel, at the office of Ira S. Lillick, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, personally appeared before me, James P. Brown, Esq., a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., John Baxter, John Owen, Jan Olsson and Robert Conchar, witnesses produced on behalf of the respondent.

L. T. Hengstler, Esq., appeared as proctor for the libelant, and Ira S. Lillick, Esq., appeared as proctor for the respondent, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the depositions of John Baxter, John Owen, Jan Olsson and Robert Conchar may be taken *de bene esse* on

(Deposition of John Baxter.)

behalf of the respondent, at the office of Ira S. Lillick, Esq., in the Kohl Building, in the City and County of San [178] Francisco, State of California, on Thursday, September 15th, and Friday, September 16th, 1910, before James P. Brown, Esq., a United States Commissioner for the Northern District of California, and in shorthand by Clement Bennett.

It is further stipulated that the depositions, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.)

[Deposition of John Baxter, for Respondent.]

JOHN BAXTER, called for the respondent, sworn.

Mr. LILLICK.—Q. State your name, age and occupation.

A. My name is John Baxter; age, 45; occupation, master mariner.

Q. How long have you been a master mariner?

A. 15 years.

Q. How long have you been master of the "Dolbadarn Castle"? A. Nine years.

Q. How old a vessel is she? A. 12 years old.

Q. How is she constructed? A. She is steel.

(Deposition of John Baxter.)

Q. What kind of deck? A. Pitch pine.

Q. How many decks has she?

A. Just the main deck. No between-decks, but between-deck beams.

Q. I hand you a pen and ink drawing, Captain, and ask you whether that is approximately a correct description of the vessel with [179] its holds, and the character and amount of its cargo in its various compartments. (Handing.)

A. Yes, sir; it is quite correct.

Mr. HENGSTLER.—Q. You mean as far as stowage is concerned? A. Yes, sir.

Q. Not as far as dimensions is concerned; just as far as stowage is concerned?

A. Just as far as stowage is concerned, yes.

Mr. LILLICK.—I will offer this in evidence.

(The document is marked Respondent's Exhibit "A.")

Q. What is the depth of the hold?

A. 23 feet, 5 inches from the main deck down to the bottom.

Q. The various figures as to tonnage in the various compartments on this plat are correct, or are they not? A. They are correct.

Q. How many ventilators are there on the vessel?

A. Five. Two forward, two aft, and a large one amidships.

Q. What kind of ventilators are they?

A. Cowell ventilators.

Q. As to the central ventilator, what position was it in with regard to the cement that was stowed on board?

(Deposition of John Baxter.)

A. The main deck ventilator went right down through the pump-well, and it was open one foot underneath the between-deck beams on top of the tanks, and there were also places for ventilating the between-decks, as well.

Q. Where were your water-tanks?

A. The water-tanks were stowed underneath the amidship ventilator and between the cargo. It went right through the general cargo.

Q. What do you mean by between the cargo?

A. That is cargo on both sides of the tanks.

Q. How large were the tanks?

A. 2,500 gallons each.

Q. What portion of the hold did they occupy, in length?

A. They are 8 feet by about 16 feet across. There are two tanks, one alongside of each other. [180]

Q. Did the 8 feet in breadth run crosswise across the ship?

A. No, sir; that one ran fore and aft.

Q. Give the dimensions, Captain, as to depth, running down in the hold, length running with the ship, and breadth running crossways.

A. 12 feet high, 8 feet fore and aft, and 2 tanks 12 feet across athwartships.

Q. How was the cargo stowed as to its nearness to these tanks?

A. Right up against the battens that run up and down the tanks. The battens were to prevent the tanks being chafed.

Q. Where were the hatches with reference to the cement?

(Deposition of John Baxter.)

A. The cement came halfway along towards the main hatch, up to the forward bulkhead.

Q. How was the cement separated from the coke?

A. By two bulkheads. They were built in a most perfect manner, those bulkheads, and lined inside with mats all over from the main deck to the bottom of the lower hold.

Q. Is that a usual thing in stowing vessels, when there is cement and coke in the cargo?

A. It is a most unusual thing to have the coke separated the same as it was in my ship.

Q. Why? Have you any explanation of that?

A. There have been so much damage through not having bulkheads, and I was instructed to have a most perfect bulkhead built on each end of the general cargo.

Q. By whom was the stevedore appointed?

A. By the charterer.

Q. Was there any certificate issued after the vessel was loaded?

A. Yes, sir; there was a certificate issued by the stevedore.

Q. Where is that certificate? A. I have got it.

Q. Have you got it here?

A. I have not. I had it yesterday, but it is at the stevedore's amongst my other papers. I left it down there. [181]

Mr. LILLICK.—I should like to have that certificate. I do not know what it is worth, Mr. Hengstler. It may be objectionable.

Mr. HENGSTLER.—I shall object to the certifi-

(Deposition of John Baxter.)

cate of the stevedore who is not present, on the ground it is hearsay and incompetent.

Mr. LILLICK.—I will not offer it.

Q. What, if anything, did the stevedore certify as to the stowage of the cargo?

Mr. HENGSTLER.—I object to that question, because if he certified, he would probably certify it in a certain writing. (To the witness.) Did he not, Captain?

A. Yes, I had a letter certifying it.

Q. Have you got that letter here?

A. It is down at the stevedore's amongst my other papers.

Mr. LILLICK.—Q. Cannot you send one of your apprentices after it, Captain? A. Yes, sir.

Q. You are familiar with the condition of your vessel with regard to stowage, are you not?

A. Yes, sir.

Q. In your opinion was this cargo stowed properly or improperly?

Mr. HENGSTLER.—I will reserve an objection to that, on the ground it is a conclusion of law and involves a question of law as to whether cargo is stowed properly or not.

A. Yes, sir, it was.

Mr. LILLICK.—Q. How long did you say you had been master of the vessel? A. Nine years.

Q. During those nine years how many cargoes have you had loaded upon her? A. Eight.

Q. From your knowledge of the manner in which the vessel carried her previous cargoes, are you in

(Deposition of John Baxter.)

a position to state whether the [182] manner in which the cargo was stowed on the voyage out of which this action has arisen, made the vessel stiff, or tender or cranky?

A. The ship was in beautiful trim.

Q. In your opinion was the vessel stowed properly or improperly?

Mr. HENGSTLER.—Objected to on the ground that it does not call for a fact but a mere conclusion of the witness, and involving a conclusion of law.

A. Properly.

Mr. LILLICK.—Q. I hand you what purports to be a charter-party dated November 17th, 1909, between the Dolbadarn Castle Ship Company, Limited, and Parrott & Company, and ask you whether it is the charter-party for the voyage from Rotterdam to San Francisco in which the cargo, the damage for which has been sued for in this case, was carried. (Handing.) A. That is the charter-party.

Mr. LILLICK.—I offer this in evidence as Respondent's Exhibit "B."

(The paper is marked Respondent's Exhibit "B.")

Q. I hand you a document marked "California Trade Bill of Lading," dated Rotterdam, February 19th, 1910, and ask you whether it is the bill of lading under which the steel for which the alleged damage to which this action has been brought was shipped. (Handing.)

A. Yes, sir, that is the charter-party, at least the bill of lading.

Mr. LILLICK.—I offer this in evidence and ask

(Deposition of John Baxter.)

that it be marked Respondent's Exhibit "C."

(The paper is marked Respondent's Exhibit "C.")

Q. I hand you a document marked "California Trade Bill of Lading," dated Rotterdam, February 19th, 1910, which purports to be a bill of lading for 2775 barrels of cement, and ask you whether it is the bill of lading under which the cement for the alleged damage [183] to which this action was brought was shipped. (Handing.)

A. Yes, sir, that is the bill of lading.

Mr. LILLICK.—I offer that in evidence as Respondent's Exhibit "D."

(The document is marked Respondent's Exhibit "D.")

Q. What was the condition of the "Dolbadarn Castle" in Rotterdam before the voyage commenced, if you know?

A. It was in good condition. The ship had just passed No. 3 survey.

Q. What is No. 3 survey?

A. A special survey; No. 3 special survey; that is when she is twelve years of age.

Q. Do you know whether any tests were made of the deck to see if it was water-tight?

A. Yes, sir, they were tested by the surveyor.

Q. What surveyor? A. Lloyd's Surveyor.

Mr. HENGSTLER.—Q. They were not tested by you yourself? A. Not myself personally.

Mr. LILLICK.—Q. You were there when the test was made? A. I was.

Q. How was it made, with water or otherwise?

(Deposition of John Baxter.)

A. The carpenter tested it with a caulking iron.

Mr. HENGSTLER.—Q. That was to see if the seams were all right? A. Yes, sir.

Mr. LILLICK.—Q. Did the deck pass inspection?

A. Yes, sir.

Q. What character of a voyage did you have, Captain, as to fair weather or stormy weather?

A. We had one of the heaviest gales that ever I experienced during the 26 years.

Q. Captain, I hand you what purports to be the log-book of the bark “Dolbadarn Castle” on her voyage from Rotterdam to San Francisco, contained in two log-books, one commencing upon the 23d day of February, 1910, and ending on the 24th day of May, 1910, the other commencing on the 25th day of May, 1910, and ending on the [184] 14th day of September, 1910, and ask you whether these two books contain the daily log of the vessel for the voyage between Rotterdam and San Francisco. (Handing.)

A. They do.

Mr. HENGSTLER.—Q. They are made out by the first mate, or aren't they? A. Yes, sir.

Q. They are not made by yourself?

A. No, sir.

Mr. LILLICK.—Q. They are signed on each page by you? A. Yes.

Q. Did you go over these from day to day when they were signed? A. Yes, sir.

Q. Do you know whether or not these contain a daily statement of the character of the voyage and what happened upon it, written upon the days when

(Deposition of John Baxter.)

the log purports to have been written?

A. Yes, sir.

Mr. LILLICK.—I will ask that these books be marked Respondent's Exhibit "F" and "G" for Identification.

(Counsel stipulate that the log-book may be offered in evidence by either party on the trial of the case, and be used without objections, and that it may remain in the custody of counsel for the respondent until the trial.)

Q. During your experience as a mariner how many times have you gone around the Horn?

A. 12 times.

Q. How did the weather upon the trip which you have just closed compare with the weather upon your previous voyages?

A. As I said before, we had one of the worst gales that ever I experienced on this passage.

Q. For how long a period did the heavy weather continue?

A. The first heavy weather lasted three days.

Q. When did that heavy weather commence?

A. On the 5th of May.

Q. Was any damage done to the vessel?

A. Yes, sir; there was a good deal of damage done.

[185]

Q. What?

A. Stays carried away, sails blowed away. The bell was torn from its fastening and the forecandle-head, the belfry, was smashed.

Q. How high is the belfry above the deck?

(Deposition of John Baxter.)

A. Eight feet *about* the main deck.

Q. What happened with regard to the waves?

A. There was a monstrous sea came over the bow that swept everything.

Q. What do you mean by "swept everything."

A. It filled the decks fore and aft.

Q. What was the condition of your ventilators at the time that this heavy sea came on board, if you know?

A. The ventilator on the main deck was covered. We had covered it a short time before that.

Q. What was the condition of the hatches?

A. The hatches were battened down.

Q. How long after this first heavy weather that you had did you have other heavy weather, if you had any?

A. We had a few days afterwards when we got down towards Cape Horn.

Q. How long did this continue?

A. Off and on for about 10 days.

Q. Do you know what effect, if any, this heavy weather had on her decks?

A. Yes, sir; they were strained and leaking in some places.

Q. How do you know?

A. I saw evidence of it underneath the deck, on the cargo being discharged.

Q. What evidence did you see of it?

A. I could see it had been wet at the seams.

Q. How could you tell it had been wet at the seams?

(Deposition of John Baxter.)

A. You could see it; the damp had not gone out from the wood, and you could see the dry salt in some places.

Q. Were there any stains alongside the seams?

A. Yes, sir.

Q. Did you examine the vessel in the hold as to the opening about the main ventilator?

A. Yes, sir. [186]

Q. What was the condition there?

A. I found that the salt water went down there.

Q. What evidence of salt was it?

A. I could see the traces of it running down the tanks, and on the edges of the plates.

Q. You are speaking now of the time when you examined the vessel after she was being loaded, are you? A. Yes, sir.

Q. How close to the edge of the tanks was the steel piled?

A. One inch and a half from the sides of the tanks.

Q. And how was the steel piled?

A. Plate upon plate.

Q. Were the ends flush and regular?

A. They were pretty well; not altogether; sometimes there would be a plate that would come perhaps this far from the tanks, about a foot, and sometimes right up against the side of the tank.

Q. Did you see any physical evidence of water having run down the sides of the tanks? A. Yes, sir.

Q. What was it?

A. You could see the stains of the water where it had come down.

(Deposition of John Baxter.)

Q. Could you tell whether or not any of this water that had come down had made its way over upon the plates?

A. Yes, sir; you could see where the water had shot right through the plates and struck the edges.

Q. What do you mean by shot right through?

A. If there is a pile of plates and they are piled one on top of the other, it does not matter how close they are together; if a shower of rain even was to strike the edge of those plates, the water would shoot right through between the plates.

Q. How was this cement piled with regard to its distance from the hatch and the ventilator?

A. It was right underneath the hatch.

Mr. HENGSTLER.—Q. Right underneath the main hatch? A. Half of the main hatch.

Q. The whole main hatch was not over this cement, was it? [187]

A. The bulk had come up through the half of the main hatch.

Q. And the other half was over the coke?

A. The other half was over the coke.

Mr. LILLICK.—Q. Did you examine the coamings of the hatch to see if there was any evidence of water having come through in that way?

A. Yes, sir. It did not show any signs of water coming through the hatch.

Q. Did you see the cement as it was being taken out of the vessel? A. I did.

Q. What portion of it was damaged, if you know, with regard to the tiers in which it was piled?

(Deposition of John Baxter.)

A. The top tier principally, in the wing.

Q. What was the condition of the cement below the top tier, if you know?

A. It seemed to be in good condition.

Q. Did you examine the cement as it was being taken out of the vessel with reference to whether the barrels which were immediately next to the bulkhead separating the cement from the coke were damaged?

A. Yes, sir.

Q. What was the condition?

A. The barrels were in good condition.

Q. Do I understand you to say, Captain, that it was only the top tier of cement that was damaged by water, and no other portion of it?

A. That is so.

Q. What, if anything, was done during the voyage looking towards ventilation of the vessel?

A. The fore and after hatches were kept off day and night. They were only closed up when we were forced to do so by bad weather; also a hatch at each end of the main hatches, that is, one of the wooden hatches I mean, were taken off every day in fine weather to ventilate the hold. [188]

Mr. HENGSTLER.—Q. That is the main hatch you are speaking of now?

A. Yes, sir. I spoke of the fore and after hatches before. They were kept off night and day, the fore and aft hatch.

Q. And the fore end and after end of the main hatch was taken off in fine weather?

A. In fine weather; that is, at each end over the

(Deposition of John Baxter.)

coke and over the general cargo.

Mr. LILLICK.—Q. Did you do anything after the heavy weather that you had gone through looking towards the ventilation of the cargo, or to see whether any damage had been done?

A. We could not get down below to see if any damage was done.

Q. What did you do with regard to ventilation?

A. As before, we took off the fore and aft hatches.

Mr. HENGSTLER.—Q. You did not act any differently from the way you did before the storm, did you, Captain? A. No, sir.

Mr. LILLICK.—Q. How did the vessel act during her voyage as to whether she was stiff or cranky?

A. She was neither stiff nor cranky. She was just in beautiful trim.

Q. Did you have to heave to at any time during the voyage?

A. Yes, sir; many times off Cape Horn.

Q. Was the weather in Rotterdam clear or stormy when the vessel was loaded?

A. It was fine weather.

Q. Is Rotterdam a fresh water port or salt water?

A. Fresh water.

Q. Captain, what was the condition of the steel plates in Rotterdam before they were presented for shipment, if you know?

A. The mate signed for them, "more or less rusty."

Q. What do you mean by saying that the mate signed for them as being more or less rusty?

(Deposition of John Baxter.)

A. On the receipt that was presented to the mate he marked "more or less rusty." [189]

Mr. HENGSTLER.—I move that that portion be stricken out on the ground it is not responsive. The question is, what condition were they in when they arrived at your ship and when you put them in. Did you see them yourself? A. Yes, sir, I did.

Q. You saw those steel plates? A. Yes, sir.

Q. You noticed their condition?

A. They were slightly rusty.

Q. Did you mark it so on the bill of lading?

A. I did not.

Q. You did not take any exception to their condition?

A. The bills of lading cover rust, and that was pointed out to me by the *charter's* agent in Rotterdam, and I wanted this clause put on the bills of lading, and they pointed out that clause on the bill of lading, so I signed a clean bill of lading on that account.

Mr. LILLICK.—Q. What was the object, if you know, of the mate's writing anything on the receipt presented to him?

Mr. HENGSTLER.—I object to that question.

Mr. LILLICK.—I will withdraw the question.

Q. You say that it is only because the charterer's agent pointed out to you in the bill of lading the exception with regard to rust that you did not mark upon the bill of lading the condition of the steel plates when they were received by you?

A. Yes, sir; as put forth by the mate's receipts.

(Deposition of John Baxter.)

Q. That is hardly an answer. Repeat the question, Mr. Reporter.

(The reporter reads the question.)

A. Yes, sir.

Q. You saw those steel plates yourself?

A. Yes, sir.

Q. When the vessel was discharged here in San Francisco at the end of the voyage did you notice any evidence of sweat in the vessel?

A. Not in the compartment where the general cargo was stowed. [190]

Q. Did you particularly look to see whether there was any signs of it? A. I did.

Q. Would there have been any evidences on the steel plates of the ship itself had there been sweat in the hold? A. Decidedly.

Q. What would those evidences have been?

A. They would have been all stained.

Q. Were *they* any such stains in the hold?

A. Where the coke was stowed.

Q. There was? A. Most decidedly.

Q. What was the condition of the steel plates of the vessel where the general cargo was stowed and the cement? A. It was perfectly clean.

Q. Did you have a port warden's certificate made out when you arrived?

A. Yes, sir; I engaged a port warden.

Q. I hand you a certificate purporting to be signed by Thomas Wallace, Port Warden, and ask you whether it is the certificate made to you which you refer to? (Handing.) A. Yes, sir.

(Deposition of John Baxter.)

Mr. LILLICK.—I will offer this in evidence and ask that it be marked Respondent's Exhibit "H."

Mr. HENGSTLER.—I object to it as incompetent, irrelevant, and hearsay, and immaterial.

(The paper is marked Respondent's Exhibit "H.")

Mr. LILLICK.—Q. I hand you a letter dated February 22d, 1910, which purports to have been signed by a stevedore at Rotterdam, and ask you whether it is the certificate about which you testified a few minutes ago when you said that the stevedore had certified to the proper stowage of the vessel. (Handing.) A. Yes, sir.

Mr. LILLICK.—I offer it in evidence as Respondent's Exhibit "I."

Mr. HENGSTLER.—I do not think it amounts to much, but at the same time I want to reserve a formal objection to its admission, [191] on the ground that it is irrelevant, immaterial, incompetent and hearsay.

(The paper is marked Respondent's Exhibit "I.")

Mr. LILLICK.—Q. Do you know of any point in which the vessel herself was not seaworthy when she started on the voyage? A. No, sir.

Q. In what condition were her hatches when she started? A. They were all in good condition.

Q. And as to her rigging and tightness and strength?

A. The fact of her having passed a number 3 special survey is sufficient to say that she was in first class—

(Deposition of John Baxter.)

Mr. HENGSTLER.—Do not give your conclusions, but answer the question.

A. Yes, sir, she was in good condition.

Mr. LILLICK.—That is all.

Cross-examination.

Mr. HENGSTLER.—Q. The general cargo in this ship was carried about amidships, was it not?

A. Yes, sir, about amidships.

Q. In the fore part and in the after part of the ship was coke? A. Yes, sir.

Q. I suppose the entire fore and aft part was all filled up with cargo?

A. There was a small space at the fore hatch and a small space at the after hatch that was clear of coke, about 100 tons space at each end.

Q. Was clear? A. Yes, sir.

Q. Then the general cargo filled in a column about amidships of the vessel?

A. About amidships, a little bit abaft, if anything, because that put her by the stern, if anything, on account of the coke.

Q. A little bit abaft from amidships, but not exactly in the middle of the ship?

A. No, sir, a little more aft. [192]

Q. How long was that column fore and aft, how much space was filled up by general cargo?

A. I could not tell you exactly.

Q. About? A. There was about 13 beams.

Q. How many feet is that, Captain?

A. About 50 feet—52 feet.

Q. What is the length of the whole vessel, as far

(Deposition of John Baxter.)

as the hold is concerned?

A. She is 275 feet; that is between perpendicularly. The fore peak has come off from that.

Q. I mean as far as the carrying space is concerned. A. 265 feet.

Q. So there was about 200 feet or a little more of coke, and a little more than 50 feet of that general cargo? A. Yes, sir.

Q. The general cargo filled in the space from wing to wing, did it not? A. From wing to wing.

Q. How high was it stowed? Right up to the deck? Or was there any space between the general cargo and the deck?

A. Right up to the deck, only underneath half of the main hatch there was a small space.

Q. Outside of that it came right up to the deck, did it? A. Yes, sir.

Q. That small space was left just for some one to get down?

A. It was not right up to the deck. You could not get a barrel up there. There might be two feet underneath the deck. You cannot stow barrels the same as you can a sack of wheat.

Q. Was all this cement stowed in the ship consigned to Parrott & Company under this bill of lading in evidence here?

A. All consigned to one party.

Q. All covered by this one bill of lading?

A. All covered by this one bill of lading.

Q. As far as the steel plates are concerned, are they covered by one bill of lading?

(Deposition of John Baxter.)

A. They are also covered by one bill of lading.
[193]

Q. What other cargo was there besides the cement and steel plates? A. Steel bars.

Q. To whom were they consigned?

A. To Parrott & Company.

Q. Where were they stowed?

A. One hundred and sixty tons stowed in the between decks; 250 tons right in the bottom.

Q. In the bottom of the hold?

A. In the bottom of the hold; 250 tons right across the main hatch, in the fore part of the mainmast and on top of the plates.

Q. There was no other cargo besides these three items mentioned?

A. That was all that was in the compartment, cement, plates and bar steel.

Q. Do you know where the steel plates were stowed which are here in suit as having been damaged and rusted?

A. Where were they stowed? They were stowed on top of the 250 tons of the bar iron in the lower hold.

Q. All of them? A. All of them.

Q. I notice that you have marked in your stowage plan 300 tons of such plates, whereas the bill of lading; I think, shows a larger number, does it not?

A. Probably. I made that out from memory.

Q. What did you take from memory?

A. The 300 tons.

Q. It was about 300 or 310 tons?

(Deposition of John Baxter.)

A. Yes, sir. You could see the kilos on the bill of lading.

Q. Now, this general cargo was separated from the coke by bulkheads fore and aft, was it?

A. Yes, sir.

Q. Did those bulkheads come right up against the wings of the ship and up against the deck?

A. Yes, sir.

Q. Tight? A. Yes, sir. [194]

Q. Not real tight, was it? You cannot be so particular as to fitting it right in?

A. It was not dovetailed or caulked.

Q. What kind of a bulkhead was it; what was it made of?

A. It was a white wood but hard. I don't know exactly the name of the wood.

Q. How thick was the wood, Captain?

A. It was either three-quarters or an inch. I could not say exactly. I think it was three-quarters.

Q. It is not one piece of wood, is it—it is boards?

A. Yes, sir.

Q. Boards which are placed side by side?

A. Athwartships.

Q. These boards are not dovetailed, one into the other? A. Not tongue and grooved.

Q. One is fitted on top of the other as well as they naturally fit together; that is all, is it not?

A. Yes, sir.

Q. In other words, these boards are not tight?

A. Yes, sir, they are tight. You could not see daylight through between them.

(Deposition of John Baxter.)

Q. When the cargo is out cannot you see light through them? A. No, sir, you could not.

Q. Are you sure? Have you ever tested?

A. Yes, sir, I have looked. They were lined with mats as well right from the deck to the bottom of the hold.

Q. What kind of mats were they?

A. We call them dunnage mats.

Q. Do they cover the board entirely and every square inch of the board?

A. They cover every part of it.

Q. On both sides of the boards or only on one side?

A. Only on the inside of the bulkhead.

Q. The coke is in bulk right up against the board?

A. Yes, sir.

Q. Did you examine the tanks of the ship before she left Rotterdam? A. Yes, sir. [195]

Q. Did you examine them in reference to whether they leaked or not? A. I did.

Q. Was there any leak? A. No, sir.

Q. None whatever? A. None whatever.

Q. Under whose supervision was the stowage of the vessel made? Under yours or the stevedore's?

A. Under my own supervision.

Q. You are responsible entirely for it?

A. Yes, sir, entirely.

Q. During your experience in carrying cargoes have you ever carried cargoes of coke for this voyage? A. Yes, sir.

Q. How frequently?

A. Since I have been master only once, and that

(Deposition of John Baxter.)

was up to San Francisco in the same ship.

Q. Did she on that occasion carry anything else besides coke, or was she loaded with coke altogether?

A. No, sir. She had pig iron, brick and tombstones.

Q. No steel plates? A. No steel plates.

Q. All that was material that could not be damaged by any sweat that might come from the coke, was it, on that occasion? A. I should think not.

Q. You know that coke absorbs moisture very easily, do you not? A. Yes, sir.

Q. That is full of water when it gets into the ship?

A. I don't know that it is. I have seen them making it.

Q. Did you take any particular precautions in stowing this general cargo by reason of the fact that there was so much coke in your ship, or would you have taken the same precautions if instead of coke there had been anything else in the vessel?

A. No, sir. I would not have taken the precautions I did with the coke if there had been any other cargo.

Q. Why not?

A. When I say any other cargo, it depends on what the cargo is; but with coke I know that coke is liable to sweat, and that is why I took the precaution to have the bulkheads made in such perfect manner. I don't know there was ever bulkheads [196] came into San Francisco in such a perfect condition as ours were.

Q. You were aware when you stowed that coke in

(Deposition of John Baxter.)

Rotterdam that it was necessary to have tight bulkheads between the coke and general cargo?

A. Yes, sir.

Q. And you say those bulkheads were in perfect condition? A. In perfect condition.

Q. And arrived here in perfect condition?

A. And arrived here in perfect condition.

Q. Did you notice any sweating on the bulkheads after the cargo was taken out?

A. I noticed the mark of a stream about four feet long on the bottom of the mats from the between-decks down, that was in the after bulkhead. Captain Pillsbury, the surveyor for Parrott & Company, was in my company in the hold at the time, and I pointed it out to him.

Q. What did you think that stream came from?

A. I should say from a leak in the deck.

Q. Could you have distinguished whether it came from that, or whether it was sweat coming from the coke, by looking at it?

A. It could not be sweat.

Q. You could not tell the difference, whether it was the one or the other by merely looking at it?

A. Yes, sir, most decidedly I could.

Q. Why.

A. Because it did not show any signs of sweat anywhere else. It was a decided mark of water.

Q. There was no sign of sweat anywhere else, anywhere else in the compartment in which the general cargo was carried? A. No, sir.

Q. Did you look for it?

(Deposition of John Baxter.)

A. The only places I saw were marks on the tanks.

Q. Did you not see marks of sweat on the steel plates? [197] A. On the cargo.

Q. On the cargo itself?

A. I saw the rust on it, being discharged.

Q. You saw stains on those plates when they were discharged? A. Rust.

Q. Were there not stains too that would show that there was water either salt or fresh that came in contact with them? A. Yes, sir.

Q. Did you notice such stains in any other part of the cargo on the hoops of the casks and barrels of the cement? A. Not the same.

Q. Did you notice any stains on those?

A. The hoops were more or less rusty on the cement, and my surveyor tested 25 of the barrels and found salt.

Q. Did you make any tests?

A. I saw the test made.

Q. What kind of a test was made?

A. With some stuff in a bottle. I could not tell the name of it. Something of silver they call it.

Q. Now, you said that water entered through the decks during the storm that you testified to, did it?

A. Yes, sir.

Q. How did it enter—through the hatches or through the seams?

A. Through the seams of the deck.

Q. How do you know that?

A. I could see the stains on the underneath part of the deck, and also stains on the cement barrels.

(Deposition of John Baxter.)

Q. I thought you said awhile ago you did not see any signs anywhere except the streaks that you noticed in the after bulkhead, didn't you?

A. We were talking about the sides of the cargo and not about the cargo then.

Q. As a matter of fact, there was a great deal of evidence of stains inside of that compartment in which the general cargo was carried, were there not?

A. Do you mean on the bulkhead or the sides of the ship? [198]

Q. All over, bulkhead and side of the ship.

A. No, sir.

Q. Deck?

A. There was evidence of leaks in the deck.

Q. I did not ask you what they came from, but you noticed there were stains on the deck?

A. Yes, sir.

Q. You noticed stains on the bulkheads?

A. On the after bulkhead, yes.

Q. Did you test the stains on the deck as to whether they were salt water stains or stains from sweat? Did you test them?

A. I did not test them. It is wood.

Q. How do you account for the damage to the steel plates and to the cement in this case? Let us hear your opinion. A. Stress of weather.

Q. Stress of weather in what regard?

A. The ship laboring and straining and leaking through the deck, and also through water going down the main ventilator.

Q. Did a more than usual amount of water enter

(Deposition of John Baxter.)

in that way, according to your opinion?

A. Well, no, I don't think so.

Q. Just the usual amount?

A. There is no water enters there unless the ship is in bad weather. When you get in a gale of wind such as we were in it is most unusual.

Q. What I am asking you is this: In your opinion did a more than usual amount of water enter into the hold of your ship through the seams and through the ventilator?

A. Water does not generally enter there at all.

Q. It is not supposed to enter there at all.

A. It is not supposed to enter there at all.

Q. That is what I mean. Therefore, there was more than a usual amount. Does it happen very often that water gets into the interior of a ship through seams?

A. Not unless through stress of weather. If the ship is in a proper sea condition and does not [199] get in bad weather she ought to be tight everywhere.

Q. How about the ventilator? Was the ventilator covered up before the bad weather began?

A. It was covered up—it was covered up when the bad weather began. The sea came over so much that I was frightened that the water would go down below.

Q. Do you think that much water entered through the ventilator? A. I don't think so.

Q. In your opinion, did enough water enter through the ventilator to account for the damage to the steel plates and to the rust on the hoops of the

(Deposition of John Baxter.)

cement barrels and the damage to the cement? What is your opinion?

A. My opinion is that there was sufficient water went down the ventilators to damage the plates in the condition they were. The water that came through the deck damaged the cement.

Q. That is your theory?

A. That is my theory of it.

Q. That the salt water that entered through the ventilators damaged the steel plates, and water entering through the seams damaged the cement?

A. Yes, sir.

Q. How far down into the hold does the ventilator reach? A. Right to the bottom.

Q. Right to the bottom of the hold?

A. Right to the bottom of the ship.

Q. Is that usual?

A. It is usual, yes. For the main deck ventilator it also goes down the pump-well.

Q. If it reaches down to the bottom of the ship, then the bottom of the ship of course is ventilated properly by that? A. Yes, sir.

Q. Now, how about the higher portions of the hold?

A. There is a foot or space between the tanks and the between-deck beams which enters into the space where the ventilator goes down to. It is all open at the top of the tanks. [200]

Q. Anything above that is not ventilated by this ventilator, is it? A. Yes, sir.

Q. In what way?

A. There is one of the deals in the after part of

(Deposition of John Baxter.)

the casing with a hole in it which you can put your fist through, and there are also holes between the top deal in the casing and the main deck.

Q. And those holes is what you rely on for the ventilation of the upper part of the hold?

A. Of the between-decks.

Q. The between-decks is the same thing as the hold of your vessel?

A. It is when there is nothing in it. If the between-decks is full of cargo, the cargo in the between-decks is laid on the between-deck beams and forms a deck.

Q. In this case there was no deck?

A. There was no deckload but there were steel bars.

Q. Did you notice any evidences of seams leaking all over the deck or any particular portion of the deck?

A. She was leaking in several other places where the coke was stowed. The deck was leaking there also.

Q. In what part of the deck was she leaking?

A. There were some leaks in the after part and some in the forward part.

Q. With reference to the parts of the deck which were above the general cargo, where were the leaks in the seams? A. Towards the wing.

Q. Which wing? A. Both wings.

Q. Were there any over in the middle or center of the ship?

A. There was one or two in the center, too.

Q. The leaking seams were all over the deck?

(Deposition of John Baxter.)

A. Pretty well. They seemed to be leaking around about the mast. [201]

Q. The mast is right in the center?

A. Right in the center, yes.

Q. Is it not a fact that most of the leaking was right around the mast? That is the place where most of the water entered?

A. I could not say as to that. I don't think so.

Q. But water did enter that space right around the mast did it not? A. Through the deck.

Q. Did you notice any moisture in any portion of the general cargo, any dampness?

A. No, sir, I cannot say that I did.

Q. When the cargo came out of the hold?

A. When the cargo was coming out?

Q. Yes.

A. No, sir, I cannot say that I did. I did see one or two places that were wet but that was on account of a bucket of water that the stevedore was using. That is the only sign that I saw of any dampness on the plates.

Q. Where was that dampness? On any part of the cargo?

A. On top of the plates where a bucket of water had been discharged that the stevedore was using.

Q. Was that the only evidence of dampness that you noticed in the cargo when it came out?

A. That is the only evidence that I noticed.

Q. No evidence of any salt water there?

A. Only alongside of the tanks.

Q. There was evidence of salt water there?

(Deposition of John Baxter.)

A. Evidence of rust on the edges of the plates and also where the corrosion had shot in between the plates, as I mentioned before.

Q. Did you make a test of those, as to whether it was due to fresh water or salt water?

A. I saw one test made.

Q. I asked you, did you make a test?

A. I did not make a test, no.

Q. Did you read the Port Warden's certificate?

A. I did.

Q. You noticed, did you not, that his report is, all the way [202] through, that a number of barrels of cement were stained, and the hoops were rusted, did you not? A. Yes, sir.

Q. That is correct? A. I noticed the hoops.

Q. You noticed the hoops yourself and you noticed the stains on those barrels?

A. What does he say about the stains?

Q. Stains and hoops rusted?

A. How many does he say? He does not say many.

Q. "Found quite a number of barrels of cement in main hatch in both wings slightly stained and hoops rusted?" A. Yes, sir.

Q. Did you notice those slight stains yourself?

A. I did. That was on the top there.

Q. Those were stains on the barrels themselves?

A. On the barrels.

Q. Not on the hoops?

A. On the barrels. You could not see a stain on a hoop.

Q. You saw those stains yourself, did you not?

(Deposition of John Baxter.)

A. I saw them, yes.

Q. Did you notice any of the rust on the steel when it came out? A. On the steel plates?

Q. Yes. A. Yes, sir, I saw it.

Q. Did you notice any signs of sweat in the hold in the neighborhood of where the steel plates were stowed?

A. No, sir; only as I said before, in the tanks I noticed evidence of stains.

Q. That was right next to the steel plates, was it not? A. Right next to the steel plates.

Q. But those evidences did not extend to the steel plates? A. Yes, sir.

Q. But there was no evidence on the steel plates?

A. There was evidence of rust and corrosion on the steel plates [203] alongside of the tanks.

Q. You do not know whether that was sweat or salt water?

A. I do. Though I did not test one personally, I was there when it was tested.

Q. You did not test it yourself?

A. I did not test it myself.

Q. You have an opinion as to what it was but you do not really know whether it was sweat or whether it was salt water, do you?

A. This test turns it to the color of milk. In this case it turned to the color of milk when they put the liquid on the rust.

Q. Did you put it on? A. Not myself.

Q. You were simply told so?

(Deposition of John Baxter.)

A. I was there when they started in, looking on it being put on.

Q. What was that test you saw?

A. A test for finding salt.

Q. What do you use in order to make that test?

A. I don't know the name of the liquid.

Q. You don't know what it is, do you?

A. I don't know the name of it.

Q. What does it do when you use it as a test in the case of salt water? A. It turns it the color of milk.

Q. If it is not salt water what then?

A. It remains the color of water.

Q. Have you ever used that test yourself in any case? A. No, sir.

Q. You never have? A. No, sir.

Q. In this stowage plan I notice there is a line drawn here some distance below the main deck.

A. That is the between-deck beams.

Q. This line here (pointing). A. Yes, sir.

Q. That is the between-deck beams?

A. Yes, sir.

Q. Is not this the between-deck beams (pointing)?

A. No, sir. This is the main deck. [204]

Q. Then the line which I point out is the main deck?

A. That line you are pointing to is the main deck.

Q. I have forgotten whether I asked you,—the coke did not come right up to the main deck, did it?

A. Yes, sir.

Q. Right up to the main deck?

A. Yes, sir, in some places.

(Deposition of John Baxter.)

Q. But against the bulkheads did it come right up to the main deck, or was there a space left between the coke and the main deck?

A. It came up to about the main deck beams.

Q. Are you sure about that? A. Yes, sir.

Q. How about the coke in the after end?

A. It was the same.

Q. Did it come right up to the main deck beams?

A. Yes, sir, up to the barrels. You can stow a ship with coke right up to the deck. That would be impossible, unless you threw piece by piece in.

Q. I thought there must be some space left.

A. Yes, sir.

Q. Did the bulkhead dovetail into the beams?

A. No, sir. The after bulkhead went right up to the main deck on the after part of the beams. The beam was immediately in the fore part of the bulkhead, and the forward bulkhead came up to the main deck in the fore part of the beam. The beam was immediately up against the bulkhead.

Redirect Examination.

Mr. LILLICK.—Q. If the middle portion of the hold where the general cargo was had been sweaty would there have been any signs of sweat on the coamings and the beams?

A. It would have shown decidedly on the coamings and the beams.

Mr. HENGSTLER.—Q. Do you mean the hatch coamings? A. I mean the hatch coamings.

Mr. LILLICK.—Q. Was there any evidence of sweat? A. None whatever. [205]

(Deposition of John Baxter.)

Q. Did you examine for it?

A. Every time we took off the main hatch.

Q. Did you see any signs of sweat at any time?

A. I did not see any sign at any time.

Q. Did you examine while the vessel was being discharged? A. I did.

Q. Was there any evidence of sweat then?

A. Where?

Q. On the coamings and the beams in the portion of the vessel where the general cargo was stowed.

A. No, sir.

Q. Do you mean you saw no evidence of sweat?

A. I saw no evidence of sweat.

Q. Did you examine the sides of the ship where the general cargo was stowed while it was being discharged and after it was discharged to see whether there were any evidences of sweat on it? A. I did.

Q. Were there any evidences of sweat?

A. There were none.

Q. In your opinion had there been any sweat in that portion of the hold would that have shown on the sides of the vessel? A. Yes, sir.

Q. When you examined the tanks before you left Rotterdam did you look to see whether there were any signs of water streaks down?

A. The stringer boards that go around the tanks were taken down, and the tanks were scraped and painted in Rotterdam outside.

Q. And when the vessel arrived here in San Francisco there were streaks? A. Most decidedly.

Q. Down the sides of the tanks?

(Deposition of John Baxter.)

A. There were.

Q. Could you tell whether those streaks of water were from sweat or from salt water?

A. I did not test it on the tanks. No fresh water could get there.

Q. There could have been fresh water there if the ship had sweated?

A. If she sweated, yes; it would also have shown on the [206] sides of the ship.

Q. Were those streaks of water that were on the tanks streaks that could have come from sweat?

A. No, sir.

Q. In your opinion what were those streaks?

A. Salt water.

Q. Captain, if there had been any sweat in the portion of the hold where the general cargo was, would there have been sweat marks on the steel plates all through that portion of the hold?

A. I should say so.

Q. Did you examine the plates as they came out of the vessel to see whether the rust marks were distributed generally over the plates? A. Yes, sir.

Q. Was it all over the plates, or where was it, on what portion of the plates?

A. Mostly abreast of the tanks.

Q. And on what portion of the plate itself, speaking of the edge or the main portion of the plate?

A. Mostly on the edge.

Q. Do sweat marks on the wood of the lower portion of the deck have any different appearance from marks left by salt water?

(Deposition of John Baxter.)

A. The wooden deck would not sweat. It would not show any signs of sweat.

Q. These holes that you mentioned that you could put your fist through, as describing the ventilation portion of the ship, did they go through from the bulkhead where the general cargo was stowed into the portion of the hold where the coke was?

A. No, sir.

Q. Explain how.

A. This casing went around the top of the tanks in the pump-well. It was about 20 feet from the bulkhead where the coke was stowed.

Q. You have testified that the seams leaked more around the mast of the vessel than they did from the other portions of the deck. Where were the steel plates stowed with reference to the mast? [207] Were any of the steel plates up next to the mast?

A. Yes, sir.

Q. Did you notice while the cargo was being unloaded as to whether the rust marks were more pronounced on those portions of the steel plates about the mast and next to the water-tanks, or over in the wings below the general cargo?

A. They were more pronounced amidships by the mast and the tanks.

Q. I understood you to testify that the moisture was not very pronounced through the general cargo. If there had been sweat in the compartment where the general cargo was stowed would it have been equally distributed in your opinion? A. Yes, sir.

Q. There would have been just as much sweat over

(Deposition of John Baxter.)

near the edge of the wing as there would in the middle of the hold? A. Most decidedly.

Q. When the stevedores filled that bucket of water on the plates as the vessel was discharging, was the water wiped up, or what was done about that?

A. They let it run. You could not wipe it up. It immediately ran off and ran down amongst the plates.

Q. In testifying in regard to the steel plates themselves, you were asked the question whether there were any sweat marks on the plates. Do you mean us to understand that the rust that was on the plates was in your opinion sweat marks? A. No, sir.

Q. That stowage plan, though, you say was made from memory, is approximately, Captain, is it not?

A. Yes, sir.

Recross-examination.

Mr. HENGSTLER.—Q. Did you say that you examined the hatch coamings with reference to sweat?

A. I did.

Q. And you did not find any sweat on them?

A. None whatever.

Q. Did you examine all of the hatch coamings?

A. I did.

Q. All through the ship?

A. All through the ship.

Q. How many hatches are there?

A. Three. [208]

Q. Three hatches? A. Three hatches.

Q. And in none of them you discovered sweat on the coamings?

(Deposition of John Baxter.)

A. I could discover some sweat on the fore and after hatches after they were battened down in bad weather.

Q. You discovered some then? A. Some.

Q. Tell me how you discovered it. When the hatches are battened down you are not under there.

A. I mean when they were opened after they are battened down.

Q. I mean after arrival here in port and when the cargo came out you did not discover any evidence of any sweat at all on the hatch coamings?

A. No, sir.

Q. Not on any of them? A. No, sir.

Q. Not in the fore and after hatch or the main hatch? A. No, sir.

Q. Did you examine the hatch coamings in port with reference to discovering sweat marks on them?

A. I examined the hatches. I was not looking especially for sweat, but there was none.

Q. In any of them? A. In any of them.

Q. Did you examine the hold of the ship where the coke was stowed along the sides and the wings of the ship with reference to sweat marks? A. Yes, sir.

Q. Did you see any?

A. Yes, sir, you could see the marks of the coke up against the ship's side.

Q. What kind of marks were they?

A. They were made of paint, very dirty looking.

Q. What is she, an iron ship? A. Steel.

Q. The sides of steel? A. Yes, sir.

Q. The sweat shows very plainly on that?

(Deposition of John Baxter.)

A. Yes, sir, because she was all fresh painted to go through the survey.

Q. Do you say that the deck was not steel?

A. It is not steel. It is pitch pine. [209]

[Deposition of John Owen, for Respondent.]

JOHN OWEN, called for the respondent, sworn.

Mr. LILLICK.—Q. State your name, age and occupation.

A. My name is John Owen; age, 60; occupation, chief officer.

Q. Are you a master mariner?

A. Yes, sir; master mariner.

Q. How long have you been going to sea?

A. I have been going to sea 48 years.

Q. During that time have you been on sailing vessels entirely?

A. Sailing vessels all my lifetime; on nothing else.

Q. How long have you been on the "Dolbadarn Castle"?

A. About nine months.

Mr. HENGSTLER.—Q. This is your first voyage?

A. This is my first voyage. I joined her in Rotterdam about two months before she left.

Mr. LILLICK.—Q. How many times have you gone around the Horn?

A. I could not tell exactly. You could not count them on your fingers and toes, anyhow.

Q. Just say how many times.

A. Two dozen anyway; but I cannot tell you exactly.

Q. How did the weather on this trip that you have

(Deposition of John Owen.)

just ended, from Rotterdam, compare with the weather that you have experienced down there on other voyages?

A. I experienced just as bad weather this time as ever I did; worse, if anything.

Q. What was the condition of the vessel before she left Rotterdam as to being tight and well equipped and staunch? A. Good.

Q. How did she act on the voyage as to being stiff or cranky? A. She behaved very well, stiff.

Q. What do you mean by stiff?

A. Neither too tender nor too stiff.

Q. From your experience you can tell whether a vessel is properly stowed by how she acts in a heavy wind or heavy sea, can you not? [210]

A. Yes, sir.

Q. What is your opinion as to the manner in which the vessel was stowed?

A. She was properly stowed.

Q. Did you examine the caulking of the deck before she left Rotterdam?

A. No, sir. But the vessel went through a No. 3 survey there.

Q. You examined the deck of the vessel after she was discharged, did you not, Mr. Owen?

A. Yes, sir.

Q. To see whether there were any evidences of leaking seams, did you not? A. Yes, sir.

Q. What was the condition of the deck?

A. We found that it had been leaking. And the carpenter tried as well with the mallet and found

(Deposition of John Owen.)

some plates rather soft and the vessel was strained by laboring, I think, at sea.

Q. What evidence was there on those seams of water having come through?

A. You could see it underneath the deck on the iron plates and things; underneath the wood you could see the marks.

Q. Did you look at the side where the general cargo was stowed in the middle of the boat to see whether there were any evidences of sweat?

A. Yes, sir. There was no evidence of sweat there.

Q. Did you look? A. Yes, sir.

Q. Did you look at the water-tanks to see whether there were any water marks on them after the vessel was discharged?

A. No, sir, I did not. It might have been that water might have gone through.

Q. I understand you you did not look?

A. I did not look; no. The tanks did not leak or nothing like that. You do not mean that, do you?

Q. If there had been salt water coming from above and running down the side of the tanks, I am asking you whether there were any [211] marks on the tanks to show if any salt water had come down.

A. You could see the marks on the plates, and that is the only thing that I seen.

Q. You were down there while the vessel was being discharged, were you not?

A. Yes, sir—not all the time, but most of the time I was down there; up and down.

(Deposition of John Owen.)

Q. Did you see any marks on the plates as they came out of the vessel? A. Yes, sir.

Q. Where were the marks on the plates with reference to their edges or their sides, or all over the tops?

A. You could see it on the edges where it will show against the tanks; there was wood up and down the tanks, three inches of wood there.

Q. Did you look at the cement as it came out of the vessel?

A. Yes, sir; I seen it all on the quay there, along the wharf.

Q. Do you know, Mr. Owen, whether the cement was damaged at any place other than on the top row or top tier of the barrels? A. No, sir.

Q. Do you mean that it was or that it was not?

A. There was no damage nowhere else, only on the top tier.

Q. Did the seams which you saw evidencing leaks appear to be above where the cement was, or were they in other parts of the vessel?

A. Over where the cement was.

Q. Did you see any water spilled on these plates down there at any time during the time they were being discharged?

A. Yes, sir. I saw some spilled there by the stevedores, drinking water.

Q. How much was there?

A. Not much, a bucket or two perhaps.

Q. How did that happen?

A. It capsized. They had a bucket of water there to drink and some of *there* would kick it or something

(Deposition of John Owen.)

and they would capsize it.

Q. Who attended to the ventilators coming out?

A. I did, as a rule, and the carpenter. [212]

Q. Do you know what was done as to opening them and closing them? A. Yes, sir.

Q. What was done?

A. I had to cover them at times in bad weather to keep the water from going down, cover them over at the mouth.

Q. Do you know whether the main ventilator was open at any time during heavy weather?

A. Oh, yes, it was opened, and of course water might have gone down before we covered them.

Q. Do you know whether any did?

A. I could not swear that it did no more than I see the marks of it on the plates there, more so there than anywhere else.

Q. You say you did see marks under the ventilator? A. Under the ventilator.

Mr. HENGSTLER.—Q. You saw marks on the plates under the ventilator, did you?

A. Under the ventilator.

Q. You do not know what these marks were caused by, do you?

A. No, sir. They were caused by water, anyway.

Q. How do you know that?

A. They looked like it. I should think they were anyhow.

Mr. LILLICK.—Q. Do you know whether those marks ran down on the water-tanks as far as where the steel was stowed?

(Deposition of John Owen.)

Mr. HENGSTLER.—I object to that because he has not spoken about marks on the water-tanks at all.

Mr. LILLICK.—I withdraw the question.

A. On the plates. The water-tanks are covered.

Q. Where were those plates?

A. They were stowed alongside of the tanks.

Q. Then by saying you saw the marks of the water on the plates, you mean the steel plates that were stowed on board and not the plates of the vessel?

A. The steel plates.

Q. Those steel plates were where, with reference to how that [213] ventilator opened?

A. Where the water would run down; if any water went down the ventilator it would go right through there and run down the side of the tank and run right on to those plates.

Q. Were you on the vessel when the steel plates were received in Rotterdam? A. Yes, sir.

Q. Did you see those steel plates before they went into the vessel? A. Yes, sir.

Q. Were they in good condition?

A. They were more or less rusty.

Q. Did you look at them?

A. Yes, sir; I kept tally of them.

Q. Do you know anything about the rust upon the plates?

A. Yes, sir, I *notified* it on the ship's notes, on the notes that I gave for the cargo.

Q. To whom did you give those notes?

A. To the clerk of the firm that owned it. The

(Deposition of John Owen.)

man that was there keeping tally, he asked me for them.

Q. What did you put on those notes?

A. "More or less rusted."

Q. How many plates were in that condition, if you know? A. I could not tell that.

Q. You saw the plates when they came out in San Francisco, didn't you? A. Yes, sir.

Q. What was their condition with reference to rust here in San Francisco and their condition in Rotterdam before they were received?

A. They were worse in Frisco a great deal.

Q. Do you know whether rust that is from salt water is of a different color from rust from fresh water? A. I do not.

Q. You do not know? A. No, sir.

Q. Do you know from the experience you have had on vessels whether if that hold where the general cargo was stowed—and by that I mean the cement—had been sweated, whether the cement all through the hold would have been affected by it or not?

A. No, sir; that part was not. [214]

Q. Repeat the question, Mr. Reporter.

(The reporter reads the question.)

A. The whole lot would have been affected by it if it had been sweated.

Q. What divided the coke from the general cargo?

A. A bulkhead.

Q. Anything else besides the bulkhead?

A. Matted over.

(Deposition of John Owen.)

Q. What condition was the bulkhead in as to being tight or not?

A. Tight and in good condition. The carpenter made it and it was a very good bulkhead, both aft and forward, and all matted inside between it and the general cargo again.

Q. In your opinion, was the coke and the cement stowed properly or improperly?

A. In my opinion they were properly stowed.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Owen, if salt water gets into the hold of a ship what is the evidence of its having reached the inside?

A. You will see the marks of it.

Q. And if there is sweat inside, what is the evidence of that?

A. You could see sweat there all the time. Sweat is a thing that you have to wipe out, I think. It is not like a dripping.

Q. What is the difference between the evidence of salt water and the evidence of sweat, as far as you understand it?

A. I should think if it was sweat it must affect the whole lot. It would not affect this part of it and leave this clean (illustrating), but a leak might have gone in here and not affect this part.

Q. So your opinion is that the damage in this case was caused by a leak, is it?

A. By salt water, yes; by sea water, somehow.

Q. And the reason for your opinion is because the evidence of dampness is confined to single spots?

(Deposition of John Owen.)

A. To a single spot. When [215] one part of the thing is dry and the other part is wet, it must be a leak, or water going down—I do not say a leak, but water going down.

Q. That is the reason for your opinion?

A. Yes, sir.

Q. Did you examine the hold of this ship while the cargo was being removed here in San Francisco?

A. Yes, sir; I was down there more or less.

Q. Did you in any part of her find any evidence of sweat? A. No, sir.

Q. Did you look for sweat inside of the vessel?

A. I looked for sweat in this part, but of course the other part of the ship you could not go through until the general cargo was out. The coke was filled right up.

Q. After the coke was taken out did you notice whether there was any sweat in that part of the ship?

A. No, sir, I did not see any evidence of sweat there nowhere.

Q. Not in any part? A. No, sir.

Q. Your ship passed through the equator twice on the way here, did she not? A. Yes, sir.

Q. Now, with reference to the marks which you noticed on the steel plates, they were all near the ends of the plates?

A. On the edges of the plates, yes; either the edges or the sides, I did not notice which it was, which were stowed against the tanks.

Q. Were those the edges that were towards the coke or the edges away from the coke?

(Deposition of John Owen.)

A. Away from the coke, against these tanks.

Q. The edges that were against the tanks?

A. Yes, sir.

Q. Did you examine the whole plates?

A. The edges of the plates were not near the coke at all. There were steel rods underneath them, and they were nearer to the bulkhead of the coke than the plates. [216]

Q. Did you see any marks on those plates in any parts of them which were not near the edges?

A. I seen some rust on them.

Q. No other parts? A. No other parts.

Q. Did you see any marks on some of them all over the plates?

A. Yes, sir; water dripping on the edge it would naturally work in underneath and would run all over the plate.

Q. That is simply your theory, is it not, of how they got marked?

A. Yes, sir, of how they got marked.

Q. But they were marked all over, were they not?

A. Some of them, yes.

Q. We do not want your theories, we want the facts here.

A. I did not look at every plate as it came out of the ship.

Q. You noticed the damaged cement barrels, did you?

A. Yes, sir, I noticed there were marks of water on some of the top tiers of the cement.

Q. Are you prepared to say that all the damaged

(Deposition of John Owen.)

ones were on top and there were none that were damaged on the lower tier?

A. No, sir, I am not prepared to say that, but that is all that we noticed, to take any note of at all, was the top tier.

Q. You did not look for the damage on the other ones, did you?

A. No, sir, because they did not show any sign of it.

Q. Did you look to find out which ones of these barrels were in fact damaged?

A. The top tier was all that I see.

Q. Did you not see some barrels that were damaged and that were not on top?

A. No, sir, I did not.

Q. None whatever, did you?

A. None whatever.

Q. How many tiers high was the cement stowed?

A. About five. We had some on the between-decks and some in the lower hold.

Q. The one in the between-decks, how many tiers high was it stowed?

A. About five, I think; I would not say exactly. I think about five tiers. [217]

Q. You did not pay any attention to that?

A. No, sir, not much.

Q. The only thing you paid attention to was this question of moisture, was it not? A. Yes, sir.

Q. You did not care how otherwise the cargo was stowed, did you?

A. Yes, sir; I know how the cargo was stowed,

(Deposition of John Owen.)

but I did not know exactly the height of the tiers of cement. I know how it was laid in the ship all right.

Q. What was it laid on?

A. Iron was underneath.

Q. In the between-decks? A. Yes, sir.

Q. Underneath in the between-decks?

A. Yes, sir; and some on top.

Q. What was the iron stowed on?

A. On the beams.

Q. What was under the beams?

A. In the lower hold?

Q. Yes. A. Cement.

Q. How many tiers?

A. Two or three tiers anyway, if not more; I don't know; I could not say how many tiers there were.

Q. Could it not have been six or seven?

A. There were 500 tons of it altogether, were there not? (Addressing the captain.)

Q. Do not ask. Tell us what you know about it.

A. I am telling you that I don't know how many there were.

Q. There might have been six or seven?

A. There might have been.

Q. You paid no attention to the stowage except with reference to the damage by moisture, did you?

A. Yes, I paid attention as to it but I did not count the height of the tiers of cement.

Q. Is it not a fact that you know all about this moisture because you and the captain have discussed that together? A. What is that?

(Deposition of John Owen.)

Q. Is it not a fact that you know all about this moisture because you and the captain have been talking about that before you came in here?

A. No, sir; no more than the ship was properly ventilated. [218] We knew that, that we had to keep all the ventilation we could to keep it from sweating.

Q. And she did not sweat at all?

A. Not to my knowledge, she did not.

Q. Not in any part of her?

A. Not to my knowledge.

Q. Are you prepared to swear you did not see any sweat in any part of her? A. Yes, sir.

Q. Where did you notice the leaks in the deck above the cement and in what part of the deck, on the sides or near the mast, or in both places, or where?

A. Around the mast, most, on each side of the mast.

Q. Did you notice any seams that leaked in any other places on the deck?

A. No, sir, only around there, around the hatch, the main hatch and the mast.

Q. How far down into the hold does that main ventilator reach?

A. The ventilators only go through the upper deck and then go right down to the hold altogether, because we have only the one deck; it is an open ship.

Q. It goes right down through the between-deck beams into the lower hold? A. Yes, sir.

Q. And down into the lower hold how deep; right down to the bottom? Does it reach right down to the bottom?

(Deposition of John Owen.)

A. No, sir. If it reached right down to the bottom it would not be a ventilator at all.

Q. That is what I mean. It reaches right down to the bottom?

A. No, sir. It would not be a ventilator at all if it reached down to the bottom.

Q. Tell me how far down it reaches.

A. Only through the main deck and then it went all over the hold just the same as if there was a hold there.

Q. Do you know what the diameter is of the ventilator? [219]

A. No, sir, but I can go through it.

Q. About? What is your idea?

A. It must be 15 inches though, I think, or more.

Q. How did the rust on the steel plates after they came out of the ship here in San Francisco compare with the rust which you noticed on them in Rotterdam?

A. They were more like rust when they came out here than what it was in Rotterdam, more rougher.

Q. There was a great deal more? A. Yes, sir.

Q. Your idea is that the damage was produced by salt water coming in?

A. By salt water coming through the deck or through the ventilators. The water might have gone through the ventilator. I could not say that I see water going through there.

Q. How can you tell whether it is salt water or whether it is sweat?

A. I cannot tell but I see them testing it. I seen

(Deposition of John Owen.)

a man testing it down below in the hold.

Q. You saw a man testing it? A. Yes, sir.

Q. Did you understand the test?

A. No, sir, I did not.

Q. That man told you that it was salt water, did he? A. Salt water, yes.

Q. That is all that you know about it?

A. That is all I know whether the rust was from salt water or anything else, and if it was anything else, any sweat or anything like that, it would affect the whole lot that was in that compartment as well as the other.

Q. It would only affect the outside, would it not? It will only affect those portions of it which are on the outside and which are exposed to it?

A. I suppose so, but they were all exposed more to it than the steel plates, because everything was on top of the steel plates.

Q. If there are a number of barrels of cement then only the ones [220] which are on the outside of the tiers are the ones that would be exposed to the sweat or would be more exposed to the sweat than the ones on the inside?

A. I should think the ones along the side of the ship would be more exposed.

Q. Did you not find, as a matter of fact, that there was more damage done, more rust on the hoops of the barrels along the side of the ship than on the barrels in the inside?

A. No, sir; the other way. The barrels that I see there that came about halfway between, or more than

(Deposition of John Owen.)

that, about halfway between the ship's side and the amidships.

Q. Those were damaged the most? A. Yes, sir.

Q. Did you notice whether the ones along the wings of the ship were damaged at all?

A. No, sir, I did not see any damage there.

Q. Did you notice whether the hoops on them were rusty?

A. The hoops were a little bit rusty, more or less, on all of them.

Q. Were not the steel plates also rusty more or less all the way through? A. Yes, sir.

Redirect Examination.

Mr. LILLICK.—Q. When a hold is full of sweat, what is the condition of the air in that hold?

A. It must be very close or foul I should think.

Q. Is the atmosphere, do you know, charged or not charged with water?

A. It must be with water, I should think.

Q. Have you ever been in a vessel that has had its cargo damaged by sweat? A. Yes, sir.

Q. Do you know whether sweat goes all through wherever there is a place for the air to go, whether the sweat goes too? A. What do you mean?

Q. Do you know when a hold of a vessel has sweat in it whether it goes all through wherever the air can go?

A. The damp air [221] goes right through it, in my experience.

Q. Then wherever there would be a place for the air there would also be a place for the dampness?

(Deposition of John Owen.)

A. Yes, sir.

Q. Did you go into the hold of the vessel where the coke was stowed after the coke had been discharged? A. Yes, sir.

Q. Did you look particularly to see whether there was any sweat in there? A. Yes, sir.

Mr. HENGSTLER.—Q. And you did not find any?

A. I did not find any appearance of it at all.

Mr. LILLICK.—Q. Do you know whether there is any difference in the color of a stain made by sweat on iron, and the color of a stain made by salt water?

A. No, sir. I do not know that I do.

(By consent an adjournment was here taken until to-morrow, Friday, September 16, 1910, at 3:30 P. M.)

Friday, September 16th, 1910.

[Deposition of Jan Olsson, for Respondent.]

JAN OLSSON, called for the respondent, sworn.

Mr. LILLICK.—Q. What is your name, age and occupation?

A. My name is Jan Olsson; I am 29 years old; occupation, ship's carpenter.

Q. How long have you been going to sea?

A. 13 years.

Q. When did you join the "Dolbadarn Castle"?

A. In Rotterdam.

Q. Just before the voyage from which you have just arrived?

A. A couple of days before we sailed, and I had been on board two [222] months before she

(Deposition of Jan Olsson.)

sailed, so I had been on board altogether nine months.

Q. What do you mean by that?

A. The two days before New Year's Day I went on board the "Dolbadarn Castle" and worked on board for two months before I signed on the articles.

Q. Were you on board when they made a survey of the vessel before she left Rotterdam?

A. Yes, sir.

Q. Were you there when they tested her decks?

A. Yes, sir.

Q. What did they do?

A. They took an iron chisel and tried the seams.

Q. As ship's carpenter, was that part of your duty?

A. I was along with them and I gave them a hand. The places they wanted to try I helped them try, so as to see that everything was right.

Q. Was it a part of your duty before the vessel left Rotterdam to see whether the deck was in proper shape and the seams sound and not leaking?

A. Yes, sir; everything was all right.

Q. Did you go over the deck yourself?

A. I went over the deck myself too.

Q. Was it all right? A. It was all right.

Q. Did you test it in any way with water to see whether it leaked?

A. I see all the seams and what I think about we tried.

Q. What do you mean by what you think about?

A. I took a chisel and took one seam there and

(Deposition of Jan Olsson.)

another seam there and another seam there again. It would take too long to take all the seams.

Q. Were they sound and water-tight?

A. Yes, sir, they were water-tight.

Q. Did you go down below at any time before the vessel was loaded? A. Yes, sir.

Q. Did you wash down the decks with waters before the vessel was loaded? A. Yes, sir. [223]

Q. Did you ever go below after the deck had been washed down and look to see whether the seams had leaked?

A. Yes, sir; and there was no leak at all.

Q. There was no leak at all?

A. No leak at all.

Q. Whose duty was it after the vessel left Rotterdam to look to see whether the ventilators were closed or open? A. The ventilator was open.

Q. Whose duty was it after the vessel left Rotterdam to look to see whether the ventilators were closed or open? A. It was mine.

Q. How often did you look at them?

A. Every day.

Q. Were they left open or were they closed during fine weather?

A. Open all the time in fine weather, fore and aft hatches, and sometimes the main hatch was open in dry weather.

Q. Was it your duty to look after the hatches too?

A. Yes, sir, it was my duty and I do it too.

Q. What was done when the weather was stormy?

A. We had to batten them down when she started to ship water.

(Deposition of Jan Olsson.)

Q. What was done about the ventilators in stormy weather?

A. They were covered up with canvas covers.

Q. What kind of weather did you have on the voyage? A. Bad weather; hell of bad weather, too.

Q. What was the condition of the deck with regard to shipping seas on this voyage?

A. Oh, yes, we shipped heavy water all the time in bad weather.

Q. Were you on deck at the time when the bell was washed overboard?

A. No, sir; it was not on my watch; it was in the night.

Mr. HENGSTLER.—Do not put such leading questions. I am willing to stipulate that they will all testify that it was the worst storm that was ever experienced, because I have never seen a crew that did not have that experience. They always have the worst [224] storm that ever happened.

Mr. LILLICK.—Q. Were you ever on deck when the vessel was shipping water? A. Certainly.

Q. How many times during this voyage, if you remember, did the vessel ship water?

A. I don't remember that; I don't know how many times.

Q. As I understand you, it was your duty to open and close the hatches? A. Yes, sir.

Q. During the fair weather that followed the storm around the Horn, did you have occasion to go below at any time? A. No, sir, I never did.

Q. After the heavy weather did you look to see

(Deposition of Jan Olsson.)

whether any water had gone through any of the hatches or around the coamings of the ship?

A. No water went down there.

Q. No water went down there? A. No, sir.

Q. You looked for it, did you?

A. Yes, sir. No water went down there.

Q. What with regard to the ventilator?

A. There were two ventilators forward,—two aft, and one main.

Q. Do you know whether at any time during that voyage any water went down any of those ventilators?

A. No, sir. I never seen any water go down any of the ventilators.

Q. Do you know where the water tanks are on board of the vessel? A. Yes, sir.

Q. Can you see the tops of those water tanks from the main hatch when the hatch is off?

A. No, sir—yes, if the ship is light and no cargo, you can see the tanks from the hatch.

Q. But when she is loaded as when she was on this voyage? A. You cannot see the tanks.

Q. Why not? A. There is cargo. [225]

Q. Cargo on top?

A. No, sir, not on top. The tank is in the after part of the mainmast. The cargo goes all around the tanks.

Mr. LILLICK.—Q. During this voyage did you notice at any time any water below the deck?

A. Yes, sir; after coming here and the cargo was out.

(Deposition of Jan Olsson.)

Q. After you had come here and the cargo was out? A. Yes, sir.

Q. Did you notice any water there before you arrived here in port?

A. No, sir, I never looked for it.

Q. Could you see the portion of the deck directly under the main ventilator during the voyage here after the main hatch had been taken off?

Mr. HENGSTLER.—I do not understand that question myself.

Mr. LILLICK.—Read the question, Mr. Reporter. (The reporter reads the question.)

A. No, sir.

Q. Do I understand you to say that you did not see any water below the deck during this voyage at any time?

A. No, sir, but after we came in and got the cargo out I could see there was water coming in, and ten days after we had bad weather I see wet on top of the tank. I don't take any more notice of it, but it was wet.

Q. Where was that water with reference to any opening through which it might have come?

A. I don't know.

Q. Was the portion of the tank which you say was wet beneath the main hatch? A. No, sir.

Q. Where was it upon that tank that you saw the water?

A. It was through the ventilator. I went down through the ventilator.

Q. You went down through the ventilator?

(Deposition of Jan Olsson.)

A. Yes, sir. There is no other way to go down and look at the pump which is down there in the fore part. In the fore part of the fresh-water tanks is the [226] pump for the bilges.

Q. Is it part of your duty to take care of that pump, is it?

A. Yes, sir, that is mine; I have to look out for the pumps.

Q. How often have you to go down there?

A. I can sound the ship from the top of the deck, and sometimes I have to go down three or four times in the passage.

Q. You went down through the ventilators, you say? A. Yes, sir.

Q. Where was the water that you saw down there?

A. The ventilator led right on top of the fresh-water tanks and when you came down on top of the fresh-water tanks I could see this wet there.

Q. Did you look at the water that was on the tank to see whether it was fresh water or salt water?

A. I don't know whether it was fresh or salt.

Q. You did not make any examination?

A. No, sir.

Q. Had the water run off the tank in any way, do you know?

A. I don't know if it was running anywhere or nowhere.

Q. After you had got into port did you make an examination of the hold?

A. No, sir. I did not go down in the hold before the cargo was out.

(Deposition of Jan Olsson.)

Q. After the cargo was out?

A. After the cargo was out I went down.

Q. Did you look at the deck? A. Yes, sir.

Q. Did you see whether the seams had been leaking or not? A. Yes, sir.

Q. Had they been leaking? A. Yes, sir.

Q. What evidence was there of their having leaked?

A. There was some in the main and some in the wings.

Q. What do you mean by "in the main"?

A. In the middle of the ship, the mainmast. [227]

Q. Where were the other seams?

A. In the wing.

Q. How could you tell that they had leaked?

A. I can see the mark of the water coming through the seam. There was rust. They looked rusty. You can see the wet coming through the seam.

Q. How far apart are the seams?

A. From forward right aft.

Q. How far apart is each seam from the other running athwart ships? A. Four-inch plank.

Q. Were there any evidences on the deck there underneath to show whether the water that had come through had come through in a sufficient amount to run from one seam to the other?

A. No, sir. Sometimes the water that comes from the seam runs over three or four seams and across them.

Q. After the vessel had been discharged did you examine the hold at all where the cement had been

(Deposition of Jan Olsson.)

stowed? A. No, sir.

Q. Do you know anything about whether the hold in which the hold was stowed had sweated it?

A. No, sir, I did not look for it.

Q. You did not look for it? A. No, sir.

Q. Where were you when the cement was discharged? A. In Rotterdam?

Q. In San Francisco; where were you in San Francisco when the cement was discharged—on the wharf, or deck or down in the hold?

A. I was on the dock.

Q. Did you see whether any of the barrels that held the cement were rusty when they came out?

A. Yes, sir.

Q. Do you know whether the first cement that came out was as the last cement that was taken from the vessel?

A. Yes, sir; the first cement that came out was more rusty than the last.

Q. Was the last that come out rusty?

A. The first cement that came out was more rusty than the last. [228]

Q. Were you there during all the time that the cement was discharged?

A. I was on deck all the time.

Q. You were on deck all the time?

A. All the time.

Q. What do you mean by the cement being rusty? Are you talking about the hoops, the barrels, the staves, or what? A. The hoops.

Q. Do you know whether the hoops of all of the

(Deposition of Jan Olsson.)

barrels that came out of that hold were rusty?

A. I don't know. I did not take notice of them like that.

Q. After the vessel had been discharged, was anything done in the way of going over the seams?

A. Yes, sir; I went over the seams.

Q. How did you find them?

A. Some seams were slack, and I had to caulk them with oakum.

Q. Do you know from the examination you made whether the seams were leaky or not?

A. I take the examination from seeing them below, from inside, I could see water there.

Q. But from the top?

A. No, sir, I could not see it.

Q. You could not tell from the top?

A. I could not tell from the top.

Cross-examination.

Mr. HENGSTLER.—Q. How long have you been a ship carpenter, Mr. Olsson?

A. I have been a ship carpenter 10 years.

Q. How long was this ship in the port of Rotterdam before she left on her voyage?

A. I don't know how long she was in Rotterdam.

Q. You signed just about two days before she left, did you? A. Yes, sir.

Q. But you say you worked on her for two months?

A. Yes, sir, for two months.

Q. All the time or only once in a while?

A. All the time.

Q. In what capacity? As carpenter or what?

(Deposition of Jan Olsson.)

A. Carpenter.

Q. As carpenter? A. Yes, sir. [229]

Q. Were you the only carpenter there at the time?

A. Yes, sir. I was alone there.

Q. Why didn't you sign two months before she left if you were the carpenter?

A. I wanted to try the ship before I signed on her.

Q. Are you sure that you were working on her for two months before you signed?

A. Not sure about the day, but I was working about two months.

Q. Steady? A. Steady, yes.

Q. When you tested the seams of the deck at Rotterdam did you find any of them open?

A. No, nothing.

Q. Did any of them have to be caulked at that time in Rotterdam? A. I don't know.

Q. Did you caulk any of them at Rotterdam?

A. No, sir, I only tried them.

Q. Did you find all of them in good condition?

A. All good.

Q. Nothing was done on the seams of the deck at Rotterdam, as far as you know?

A. As far as I know they were good.

Q. You stated, did you not, that you washed the decks at Rotterdam and went below and looked to see if there was any leak. Who washed the deck—yourself?

A. No, sir, I had nothing to do with the deck.

Q. They were washed by the crew?

A. Yes, sir.

(Deposition of Jan Olsson.)

Q. In the ordinary way to keep them clean?

A. To keep them clean.

Q. They were not tested to find out whether the seams leaked? A. No, sir.

Q. Did you say you were in charge of the ventilators on the ship? A. Yes, sir.

Q. How many ventilators are there? A. Five.

Q. How many communicating with the general cargo in the center of [230] the ship?

A. Only one.

Q. And the other four communicated with the coke, did they not? A. Yes, sir.

Q. Were all of those five ventilators of the same kind?

A. No, sir. The main ventilator was bigger than the two fore and aft. Those are smaller.

Q. Did you examine the ventilators to find out whether there was any leak around the ventilators or deck before you left Rotterdam? A. No, sir.

Q. Did you examine the ventilators for the purpose of finding out whether there was any leak in the ventilator itself or in any of the covers of the ventilator before you left Rotterdam?

A. Yes, sir. I examined them before I left Rotterdam, and there was no leak at all.

Q. Did you examine the covers to see if they were rusty? A. Yes, sir. I examined the covers, too.

Q. Some of the covers you examined?

A. Yes, sir.

Q. What kind of covers were there on the main ventilator?

(Deposition of Jan Olsson.)

A. A big wooden plug first and three covers on top of that.

Q. What are those three covers made of?

A. They are made of canvas.

Q. Did you examine the wooden plugs before you left Rotterdam? Did you try any water on it to see if any water could get through it into the ventilator?

A. Yes, sir; the water could not go through the wooden plug.

Q. You made a test? A. Of what?

Q. You made a test of water on the wooden plug to see if there was any leak? A. No, sir.

Q. You did not test it? A. No, sir. [231]

Q. Did you make any examination to find out whether the plug fitted tight into the ventilator?

A. The plug fitted tight but not as tight so that they could stop the water. The plug is only to stop the canvas so that in a heavy sea it does not smash the canvas.

Q. The first cover over the opening is a canvas cover and then comes the plug on top of that?

A. No, sir. First the plug and after that is the canvas; three.

Q. You do not expect the plug to be water-tight?

A. No, sir.

Q. Do you know whether any water went into the hold through the hatches during this voyage?

A. No, sir.

Q. What do you mean, that none went through?

A. I did not see any go through.

Q. Are you sure that none went through the

(Deposition of Jan Olsson.)

hatches? A. Yes, sir; I am sure of that.

Q. Are you sure that water went through the ventilator during the voyage?

A. I am not sure, but I do not see no water through.

Q. What is your opinion as to whether water went through the ventilator into the hold? Have you got an opinion?

A. No, sir. I do not see no water going down.

Q. Have you any opinion as to whether water went down through the ventilator into the hold or not? Have you any opinion about it?

A. What opinion?

Q. Have you any opinion as to whether water went down through the ventilator into the hold during the voyage?

A. No, sir. I never seen no water went down. I do not see no water at all went down.

Q. You don't think that any went down through the ventilator, do you? A. No, sir.

Q. Do you think that any water went down through the hatches? A. No, sir. [232]

Q. Do you think that any salt water entered into the hold of this ship through the seams during the voyage? A. Only them seams that I saw leaking.

Q. Do you think that much water got through those seams? A. No, sir.

Q. You examined those seams after you came to San Francisco, didn't you? A. Yes, sir.

Q. And none of them were open, were they?

A. No, sir; they were just slack, so I had to caulk them.

(Deposition of Jan Olsson.)

Q. Do you think any more water could have gotten through those seams than mere drops of water?

A. I don't know.

Q. Very little, in fact, was it not?

A. I suppose so; it could not be much.

Q. Had you been around the Horn at all before this last voyage? A. Yes, sir.

Q. How often? A. Once before.

Q. Was this last voyage stormier than the one before? A. Oh, yes.

Q. Did you go down into the hold of the ship after the coke cargo was out of it? A. Yes, sir.

Q. Did you notice any dampness around on the ceiling?

A. No, sir, I did not take notice of it. I don't look for it.

Q. Did you notice any dampness on the sides of the ship? A. I did not look for it.

Q. Did you notice any dampness where the general cargo was stowed? A. I don't look for it.

Q. You did not see any dampness at all?

A. No, sir. I don't look for it.

Q. If there had been much you would have noticed it, wouldn't you? A. Sure.

Q. Do you think there was much when you went down there? [233]

A. I did not look for it.

Q. Now, you say you went down through the ventilator on the top of the water tank during the voyage? A. Yes, sir.

Q. How often did you do that?

(Deposition of Jan Olsson.)

A. I am not sure how many times I was down there. I was down there a couple of times.

Q. What was the reason for your going down there at those times?

A. You could lift the top part of the ventilator off and after that you can go right down.

Q. Why did you go down during the voyage? Why?

A. I was down there after the bad weather, 10 days afterwards.

Q. At that time the main hatch was sealed, was it?

A. Sealed?

Q. Closed? A. Yes, sir.

Q. Was it sealed or battened down?

A. Battened down.

Q. You were in charge of the main hatch also, were you not?

A. I had charge of all the hatches. The fore and after hatch was open all the time, night and day, and the main hatch in fine weather I opened.

Q. How many days during the voyage was the main hatch closed up, would you say, half the voyage or three-quarters of the voyage, or what would you say about it?

A. I don't know about that; only in fine weather they were open, and most of the main hatch was battened down almost all the time.

Q. Do you mean that the main hatch is closed during most of the voyage? A. Yes, sir.

Q. It is tightly closed during most of the voyage, and only once in a while it is opened in fine

(Deposition of Jan Olsson.)

weather? A. Yes, sir.

Q. When you went down the ventilator to the top of the tank it was very dark down there, was it not?

A. It was dark; yes. I took a piece of candle down. [234]

Q. What is the top of the tank made of?

A. Iron.

Q. And you say that you noticed it was wet?

A. Yes, sir, it was wet, and the wood, the case was wet too.

Q. What case do you mean?

A. There is a case right from the deck for the pumps, the pump case.

Q. The pump case was wet? A. Yes, sir.

Q. That pump case comes right out above the deck, does it not? A. Yes, sir.

Q. On the deck of the ship? A. Yes, sir.

Q. Was that pump case wet all around the ship, did you notice?

A. I did not notice if it was all around; I see that it was wet.

Q. You did not notice whether that was wet. Is that pump case standing on top of the tank?

A. No, sir.

Q. By the side of the tank?

A. By the side, in the forward part.

Q. What is the distance between the case and the break of the tank; how far forward is the pump case?

A. About this far (illustrating).

Q. About two or three feet?

A. I don't know; I never measured it.

(Deposition of Jan Olsson.)

Q. I just want to know, about. Is it two or three feet, or more or less? A. About two feet.

Q. Is there any cargo between the two?

A. No, sir.

Q. That was a vacant space, was it—it was left vacant?

A. The tank comes there and the case comes there.

Q. Then the space between the tank and the case is not filled up with cargo? A. No, sir.

Mr. LILLICK.—Q. It was wide enough for you to get down between?

A. Yes, sir; there are two pipes for the pump there.

Mr. HENGSTLER.—Q. When you are down between the two cases are you right on the bottom of the hold?

A. Yes, sir, right on the bottom of the hold; right on the bottom of the ship. [235]

Q. Were you surprised to find that the top of that tank was wet when you went down or did you expect that?

A. I don't know; I didn't take notice of it. I see that it was wet and that is all I took notice of.

Q. Was it very wet or simply a little damp?

A. Damp and wet; only wet.

Q. There was no pool of water there?

A. No, sir.

Q. Just damp to the touch? A. Just damp.

Q. Do you know what the deck of your ship is made of, whether it is made of iron or wood?

A. The deck?

(Deposition of Jan Olsson.)

Q. Yes. A. Wood.

Q. When you are down in the bottom of your ship and look up at the deck the deck is streaked and stained all over? A. Yes, sir.

Q. It is not clean inside? A. Oh, yes.

Q. Can you tell in looking up whether there is any mark that was made by water during that voyage?

A. Yes, sir, after we got the cargo out.

Q. Is it painted at all? A. No, sir.

Q. What is it—rough wood?

A. What they call pine.

Q. Just rough pine, is it?

A. I don't know what wood.

Q. It is not painted however?

A. Not painted.

Q. It is just the natural color of the wood?

A. Just plain.

Q. Just the plain color of the wood?

A. Yes, sir.

Q. And has been so for years?

A. I don't know. I suppose so.

Q. It is really dirty looking, as a matter of fact?

A. No, sir.

Q. It has a good many different colors?

A. Yes, sir.

Q. Black and gray and dark?

A. No, sir, not gray. Black in some places.

Q. Did you take any look at the bulkhead that was between the coke and the general cargo—the cement? A. What look? [236]

Q. At the partition? Who made the partition in

(Deposition of Jan Olsson.)

the ship? A. I made it. I put the bulkheads up.

Q. How long before you left Rotterdam?

A. I forget now. I could not tell you how long it was. Two or three weeks, I think, before.

Q. You put both of them in?

A. I put both of them in.

Q. What size planks were used in the making of those bulkheads?

A. The stanchions were 7 inches broad plank and 3 inches thick.

Q. Those are the stanchions? A. Yes, sir.

Q. But the boards themselves were what?

A. The board was an inch board.

Q. And how wide? A. 7 inches wide.

Q. And one inch thick? A. Yes, sir.

Q. The boards stand on end on the bottom, don't they?

A. No, sir; they come like that (illustrating).

Q. Athwartships? A. Yes, sir.

Q. The boards are laid horizontally athwartships?

A. Yes, sir.

Q. Do they stand up this way (illustrating)?

A. No, sir; this way (illustrating).

Q. Here is the ship and the board is this way?

A. Yes, sir.

Q. Do you know what horizontal is?

A. Yes, sir.

Q. Are the boards horizontal or vertical?

A. This way; horizontal.

Q. Are the boards dovetailed into each other?

A. Yes, sir.

(Deposition of Jan Olsson.)

Q. Do you know what dovetailed means?

A. Yes, sir—no, they were not dovetailed. They were not tongue and groove.

Q. They were just one placed on top of the other one?

A. Yes, sir, just one *place* on top of the other one.

Q. Were they nailed together? Was the one on top nailed on to the one below it, or were they just placed naturally one on top of the other?

A. Yes, sir. [237]

Q. Just naturally one was put on top of the other?

A. Just nailed to the stanchions.

Q. But no nails between the boards?

A. No, sir.

Q. How high did the bulkhead extend with reference to the ceiling? A. I don't know.

Q. How much space was between the top of the bulkhead and the ceiling, how many feet?

A. I don't know.

Q. One foot or three feet, or how many feet were there—have you any idea—between the top of the bulkhead and the deck?

A. They were right close up to the deck.

Q. Did it come up to a rafter on the deck, or did it come up to the deck itself?

A. It was fitted to the deck.

Q. Was there any space between the top of the bulkhead and the deck?

A. No, sir, all tight.

Q. There are a few places, are there not, where it is not tight, where there is a little crack?

(Deposition of Jan Olsson.)

A. I don't see any hole at all.

Q. Would you not expect that there would be a crack between these boards or between the top board and the deck, a small crack?

A. No, sir. I did not see no crack.

Q. You did not see any? A. No, sir.

Q. As a carpenter, would you not expect there would be such if those planks shrunk during the voyage? They shrink a little? A. No, sir.

Q. When they pass through the equator don't they shrink? A. No, sir.

Q. Are you sure about that?

A. I am not sure.

Q. Don't you know, Mr. Olsson, all wood shrinks when it is exposed to heat? A. No, sir.

Q. It warps, does it not? All wood warps when it is exposed to heat? A. Yes, sir. [238]

Q. Would you not expect a bulkhead of that sort to warp when it passes through the heat of the equator? A. I don't know.

Q. You don't know whether it did warp or not, but it is to be expected that it warps in the heat? To a certain extent, I do not mean altogether; a little it warps? A. I don't think so.

Q. As a carpenter have you ever built a house?

A. Yes, sir.

Q. You know that after a house is built very often the woodwork shrinks and warps, does it not?

A. Yes, sir.

Q. The window frames warp? A. Yes, sir.

Q. Don't bulkheads do that too, especially when

(Deposition of Jan Olsson.)

the ship passes through the equator?

A. Yes, sir; if they are all tight there is nowhere to go.

Q. Wooden bulkheads. A. Yes, sir.

Q. Are you familiar with coke? A. No, sir.

Q. Have you ever seen coke in a ship before?

A. Yes, sir.

Q. Do you know whether or not it contains water?

A. No, sir. I don't know anything about that.

Redirect Examination.

Mr. LILLICK.—Q. These stanchions on which the bulkhead was nailed were how far apart?

A. About four feet—4 or 5; I am not sure.

Q. How many nails did you put in each board in each stanchion? A. Two.

Q. How were the nails driven? As to down or straight in? A. Some straight in.

Q. Did you try to make the bulkhead tight or just nail it up to put the boards on?

A. I tried to make it tight and got it tight.

Q. Were the edges of the boards smooth or were they rough? A. They were smooth.

Q. Did you look to see whether you could see light between the [239] boards after they were up?

A. I looked but I could see no light.

Q. Each board was snug on the other?

A. On the other. I tried them together.

Q. Was anything put over the boards afterwards?

A. Afterwards the mat.

Q. Who put that mat on?

A. The crew put the mat on. I put some on too.

(Deposition of Jan Olsson.)

Q. How was it put on the bulkhead?

A. From the inside of the general cargo, right from the bottom up.

Q. Was it tacked on the bulkhead or thrown over the cargo? A. It was nailed to the bulkhead.

Q. Are you sure there was no opening up at the deck where the bulkhead joined on it?

A. There was no opening.

Q. Did you have to fit the boards in in any way where the boards crossed the deck?

A. Yes, sir; I fitted the boards in.

Q. You say you looked at the deck before you left Rotterdam. Was there any difference in the color when you arrived here in San Francisco from what it was when you were in Rotterdam? A. Yes, sir.

Q. What was the difference?

A. You could see the difference that there was no mark in Rotterdam at all of the water, and here there was a mark; plenty marks I could see here.

Q. Do you know how much water came through?

A. I don't know.

Q. You don't know whether it just dripped through or whether there were little streams of water that came through?

Mr. HENGSTLER.—He has said a half a dozen times he does not know.

A. I can only say that the water came through.

Mr. LILLICK.—Q. Going back to that ventilator, how many canvas covers were there over the wood after the wood was put in place?

A. Three. [240]

(Deposition of Jan Olsson.)

Q. You testified that there was water on the tank below. Where do you think that the water came from? A. I don't know.

Q. Where in your opinion did the water come from?

Mr. HENGSTLER.—He says "I don't know."

Mr. LILLICK.—I am going to ask the question over again.

Q. You did not expect to find water on that tank, did you?

A. I seen this wet and that is all I took notice of.

Q. Don't you think where it came from?

A. I don't know.

Q. In your opinion where did it come from?

Mr. HENGSTLER.—You have asked him that half a dozen times.

Mr. LILLICK.—He must have some opinion about it.

Mr. HENGSTLER.—He has said he has not, and he doesn't know. If you ask him half a dozen times more I suppose you can get some kind of an answer out of him.

Mr. LILLICK.—I want him to answer the last question.

Mr. HENGSTLER.—He has answered it very frequently.

Mr. LILLICK.—Read the question, Mr. Reporter. (The reporter reads the previous question.)

A. I don't know.

Q. Was the main hatch open when you went down on that day that you saw the water on the tank?

(Deposition of Jan Olsson.)

A. No, sir.

Q. Was it fine weather that day?

A. Yes, sir—not very fine though. There was water on deck; it was shipping a little water.

Q. Do you know whether that main hatch was always open in fine weather?

A. Yes, sir, in fine weather.

Q. Did you notice when you went down on that day when you found the water there whether there was any water on the wooden casing around the tanks?

A. There was water on the wooden casing.

Q. How is that wooden casing put around the water-tank; is it closed? A. No, sir. [241]

Mr. HENGSTLER.—Q. It is not around the water-tanks.

A. There is a batten around the water-tanks.

Mr. LILLICK.—Q. How did the battens run, up and down? A. Up and down.

Q. How big were they?

A. About 5 or 6 inch battens; one coming there and a place open about 6 or 7 inches, and then another batten comes, and a batten all around the tank, right around.

Q. But with those battens running up and down?

A. Yes, sir, up and down.

Q. Did you notice whether all of those battens were wet? A. I don't know.

Q. Did you see water on the battens?

A. No, sir; I didn't look there.

Q. Did you see if the wood was wet or not?

(Deposition of Jan Olsson.)

A. The tanks don't go right up to the deck; they only go to the between-decks.

Q. But these battens, did you notice whether any of them were wet?

A. I see some wet; that is all I take notice of there.

Q. Did you notice whether any of the wood was wet? A. Yes, sir, the wood was wet.

Mr. HENGSTLER.—Q. What wood? The wood of the casing or the wood on the tank?

A. On the tanks and the casing.

Mr. LILLICK.—Q. When you went down that day did you go down between the pump casing and the tank or did you go down in the casing of the tank?

A. No, sir, I don't went no further. I can see the bottom of the ship from the top of the tank.

Q. You only went to the top of the tank?

A. I got a piece of candle and I could see the bottom of the ship.

Q. The water that you say you saw on the tank, was it enough so that it wet your hand?

A. Yes, sir; it made my hands wet. [242]

Q. Would you say it was damp, or would you say there was water there?

A. I believe there was water. The wood was wet, but the wood don't sweat.

Q. What did you say about sweat?

A. Wood don't sweat.

Q. Do you know the difference between sweat in a vessel and the way it looks, and how wood looks when it is wet?

Mr. HENGSTLER.—No one can know the difference.

(Deposition of Jan Olsson.)

A. No, sir.

Mr. LILLICK.—Q. Do you know whether that water that was there was sweat or whether it was not? A. I don't know.

Q. You do not know? A. No, sir.

Mr. HENGSTLER.—Q. There was not any pool there? A. No, sir.

Q. It just felt wet to the hands? A. Yes, sir.

Mr. LILLICK.—Q. There was enough water there to wet your clothes when you sat down in it?

A. Oh, no.

Recross-examination.

Mr. HENGSTLER.—Q. How many stanchions did you put across the ship from side to side; how many stanchions were put in there altogether? A. 14.

Q. Altogether 14 stanchions?

A. Yes, sir; from one side to another, 14 stanchions.

Q. How long were those boards which you laid across? A. 22 feet long.

Q. Did each board reach all the width of the ship?

A. No, sir, from the middle.

Q. They were two put together? A. Yes, sir.

Q. When the two met in the middle, were they nailed together or just fitted together?

A. Just fitted together, in the middle of the stanchion and nailed.

Q. Nailed in the middle of the stanchion?

A. Yes, sir. [243]

Q. Then the ends which went out on the wings and the sides of the ship, were they fastened on to the

(Deposition of Jan Olsson.)

sides of the ship? A. They would fit on.

Q. In what way?

A. Just fit on in a proper tight.

Q. What do you mean by that, that you sawed them off? A. Yes, sir, I saw them off.

Q. You sawed the corners off where it was necessary? A. Yes, sir.

Q. Was the forward bulkhead forward of this case that you speak of or aft of the case, or did the bulkhead go right through the case?

A. No, sir; the case was in the middle between the two bulkheads.

Q. It was right inside of the space where the general cargo was? A. Yes, sir.

**[Deposition of John Baxter, for Respondent
(Recalled).]**

JOHN BAXTER, recalled.

Mr. LILLICK.—Q. I call your attention to the log of March 3, and the item “Westerly sea, shipping heavy water.” Will you tell us how long that continued? I mean with reference only to shipping water. A. That was coming out of the channel.

Mr. HENGSTLER.—What date was that on?

Mr. LILLICK.—March 3d.

A. She was diving into a very very heavy head sea on leaving the channel at that time.

Q. How far would that water go over the deck of your vessel?

A. It would shoot right aft. It comes over the forecastle-head and sweeps right along past amidships.

(Deposition of John Baxter.)

Q. I call your attention to the log and the item of March 4th, 1910, "Moderate gale, with heavy westerly sea. Ship diving heavy and shipping heavy water." [244]

A. That was just the same. We had to shorten sail on that account, because she was diving heavy and liable to break things up.

Q. What does that mean with reference to the deck of the vessel and the water upon it in regard to how long the water stays on the deck of the vessel?

A. In a case like this, when she was diving, the water would be on deck all the time. It was continuously coming over. Every sea that comes along she shoots right under it and the water comes aboard, and before she gets clear of one sea there is another that comes over the forecastle-head.

Q. I call your attention to the log and the items on May 5th, 1910; will you describe in a general way the situation with regard to the water on the deck at that time?

A. The ship was full up with water; the main deck was full up all the time.

Q. Upon that particular occasion was there any unusual wave that struck the vessel?

A. There was one that came over the forecastle-head, a very high one, that carried away the bell on the belfry. I suppose it was the same sea; it might have been another one, that carried away the chocks of the boat, smashing the bridge, washed away the skylight gratings which went overboard.

Q. How high up did that go with reference to the sails?

(Deposition of John Baxter.)

A. The square sails. You do not mean the square sails?

Q. I mean any of the sails?

A. It struck the head sails on the bowsprit, the main jib and foretop and staysail.

Q. And what was the result?

Mr. HENGSTLER.—Q. That is nothing very unusual is it? A. It is.

Q. It happens in every storm?

A. No, sir, not to wash a sail away with a sea like that.

Mr. LILLICK.—I never heard of it being done.

[245]

A. I have seen sea going up in a square sail, but that was a spray. This was a monster sea that came along.

Q. What did it do with reference to sails?

A. It bust those two head sails.

Q. Were they broken by the sea or by the wind?

A. By the sea.

Q. During that time and the following day when the log states "sea shipping heavy, heavy water," what was the condition of the deck?

A. The ship was lying wallowing in the sea all the time.

Mr. HENGSTLER.—Q. For how many days?

A. Three days.

Mr. LILLICK.—Q. By that you do not mean to qualify the items in the log when on other days and on other occasions the log states that the sea was coming aboard.

(Deposition of John Baxter.)

A. I don't understand how you mean.

Q. Where the log upon other days shows that the ship was shipping heavy water you do not mean to qualify those statements in any way and say that the log is incorrect? A. No, sir; certainly not.

Q. Where the log states that to be a fact it was a fact? A. Most decidedly so.

Cross-examination.

Mr. HENGSTLER.—Q. During this stormy time did she pitch to any considerable extent?

A. She did at first, the first part of it.

Q. Did she roll any?

A. She lurched to leeward.

Q. But the wind remained steady and she did not roll?

A. She lurched to leeward, laboring, the same as they do in heavy weather and a very high sea.

Q. Did she go over on her beam ends?

A. No, sir.

Q. The storm was not big enough for that?

A. I should think not. She would not go on her beam ends unless she shifts her cargo. Either that, or she has a light cargo and will not stand up to it.

[246]

Redirect Examination.

Mr. LILLICK.—Q. Did this lurching or pitching differ in any particular from the rolling and pitching of any well-stowed vessel in a sea of that character?

A. No, sir.

[Deposition of Robert Conchar, for Respondent.]

ROBERT CONCHAR, called for the respondent, sworn.

Mr. LILLICK.—Q. What is your age? A. 19.

Q. And your occupation? A. Apprentice.

Q. How long have you been on the “Dolbadarn Castle”?

A. Three and a half years.

Q. Did you have occasion to go into the hold of the vessel in Rotterdam before she started on this voyage?

A. Once or twice before the cargo was loaded.

Q. During those one or two days did you look up at the deck at all to notice the seams or the color of the deck?

A. No, I never took any notice.

Q. Were you there when the coke was being loaded on the vessel?

A. Yes, sir.

Q. What was the condition of the weather?

A. It was fine.

Q. Did you notice whether the coke was wet or whether it was dry?

A. It was dry.

Q. Why do you say it was dry? Have you any reason for it?

A. Yes, sir, very dusty; plenty of dust coming down as it was sliding down the chutes.

Q. When you arrived in San Francisco did you go below at any time and look up at the deck and see its condition?

A. Yes, sir.

Q. Will you tell us in your own words what was the condition of the deck, how it looked to you?

A. It was stained in various places with water.

(Deposition of Robert Conchar.)

Q. Why do you say it was water?

A. It could not have been anything else but water.

Q. With reference to where it was in the deck, was it near the seams or away from it?

A. It was around the seams.

Q. Was it damp at the time or only discolorations?

A. Discolorations.

Q. Did you notice the sides of the compartment where the general cargo was stowed to see whether the sides of the vessel were damp or not?

A. The sides of the vessel were quite dry.

Q. Did you look to see whether there had been any water upon the sides of the vessel?

A. No, sir; I took no notice of it.

Q. Do you know anything about the tanks next to where this general cargo was stowed with reference to whether they evidenced signs of water having been on them?

A. Yes, sir; there were stains on both sides.

Q. Were there any stains on the battens running up and down about those tanks?

A. I did not notice the battens. The battens were light painted and would not show the discolorations.

Q. What was the character of the stains on the tank with reference to size?

A. They run the whole way down the sides of the tank, the discolorations.

Q. Did you notice the cement as it was being discharged?

A. No, sir; I had nothing to do with that.

Q. Do you know anything about the condition of

(Deposition of Robert Conchar.)

the plates as they were discharged?

A. I saw them on the wharf; several of them were decidedly rusty.

Q. On what portion of the plate was the rust?

A. Some was around the edges and some ran right across in places.

Q. Were you on board when the steel was being shipped at Rotterdam? [248] A. Yes, sir.

Q. Do you know anything about the condition of the steel plates as they were received at Rotterdam?

A. They were slightly rusty but not so bad as when they were discharged.

Q. You are speaking of your own knowledge are you? A. Yes, sir.

Mr. HENGSTLER.—I want to reserve an objection to any question of that sort on the ground that it would be evidence contradicting the bill of lading and on that account improper.

Cross-examination.

Mr. HENGSTLER.—Q. When you were here in San Francisco and went down into the hold after the cargo was out you looked up at the deck, did you?

A. Yes, sir.

Q. It was pretty dark down there at all times?

A. No, sir; there was plenty of light. There was no cargo in and the hatches were off.

Q. Can you see the seams when you look up?

A. Plainly.

Q. It is not a pretty dirty looking deck?

A. No, sir, not very dirty.

Q. Is it very clean?

(Deposition of Robert Conchar.)

A. You can see the grain of the wood plainly.

Q. Is it natural wood or painted?

A. Natural wood.

Q. Do you know how old that ship is?

A. She was launched in 1897.

Q. Had you observed the deck from below from the bottom of the hold before you came here to San Francisco at any time? A. Not particularly.

Q. You do not know whether it looked any different here in San Francisco from what it did at any previous time, do you?

A. The stains were fresh, so that they would brush off to a certain extent. [249]

Q. Did you try to brush off some of those stains?

A. That was my work down below at the time. I was sweeping the deck.

Q. Did you brush some of the stains off?

A. Some of them, to a certain extent.

Q. With the fact that they brushed off you came to the conclusion that they were fresh; is that the idea?

A. That is so. Of course the deck had been brushed before.

Q. You could not tell whether those stains were sweat or salt water?

A. They were certainly not sweat.

Q. Why not?

A. Because sweat would not leave any deposit.

Q. There was a deposit there?

A. Yes, sir; that is what the stains were.

Q. What kind of a deposit?

(Deposition of Robert Conchar.)

A. It looked like a deposit of salt water.

Q. How does a deposit of salt water look?

A. Of course it is white from the salt.

Q. Is it all white?

A. If there is any dirt mixed with it, it depends what dirt is mixed with it, but it is white to a certain extent.

Q. The stains that you saw there were white stains there? A. Yes, sir.

Q. If one of the other witnesses in the case said they were dark stains, he is mistaken, is he?

A. I could not say they were all white stains.

Q. There were some black stains too?

A. Dirty colored stains.

Q. Ordinarily, the ceiling that you see above you when you are down in the bottom of the ship is expected to be a pretty dirty affair?

A. Pretty dirty.

Q. You would expect it to be very dirty when the ship is 13 years [250] old?

A. No, sir. The hold is cleaned after every cargo.

Q. The lower part of the deck is cleaned out?

A. It is swept.

Q. Now, you say that you noticed stains on both sides of the tank in the middle compartment of the ship? A. Yes, sir.

Q. Do you know how those were caused?

A. Only by water running down the side it could possibly have been caused.

Q. Do you know what kind of water it was, whether it was salt water or fresh water?

(Deposition of Robert Conchar.)

A. I could not say as to that. I concluded it was salt water.

Q. Why? A. Because it left stains.

Q. What kind of stains were those, also white stains?

A. Discolorations of no particular color; discolored paint.

Q. Can you tell salt-water stains from fresh-water stains when you see them on wood or on iron?

A. I have only seen salt-water stains.

Q. You have never seen any but salt-water stains?

A. When fresh water has been on anything I have not noticed that it has stained it.

Q. Fresh water would not stain it? A. No, sir.

Q. From the fact then that you saw stains you conclude that there must have been salt water; that is all you know about it? Simply because there were stains, therefore they were caused by salt water; that is your idea, is it not? A. Yes, sir.

Redirect Examination.

Mr. LILLICK.—Q. In forming that impression, did the knowledge that the vessel had shipped heavy seas and that the deck was awash during portions of your voyage have anything to do with the deductions that the stains were from salt water?

A. That is what made me think so.

Q. Can you give us any comparative idea of the number of seams [251] over the general cargo which showed those discolorations?

A. I don't quite understand.

Q. Can you tell us approximately how many seams

(Deposition of Robert Conchar.)

over where the general cargo was stowed, and by that I mean the cement—showed these stains?

A. I could not. I only know they were scattered through various portions of the hold.

Recross-examination.

Mr. HENGSTLER.—Q. Did you notice the same stains in the deck above the space where the coke was stowed? A. Yes, sir.

Q. It was all over the ship, was it not?

A. Yes, sir.

Q. The stains extended all over the lower side?

A. Over portions; not all over.

Q. Where are the most, in the wings of the ship or around the mast?

A. In the wings and some were around the mast.

[252]

Respondent's Exhibit "B" [Charter-party].

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ANTWERP—SAN FRANCISCO.

CHARTER PARTY.

LONDON, 17th November, 1909.

IT IS THIS DAY MUTUALLY AGREED between Dolbadarn Castle Ship Coy Ltd Messrs. R. Thomas & Co. Managers for Owners ~~or agents~~ of the good ship or vessel called the "Dolbadarn Castle"

classed 100 AI Lloyds of the measurement of 1860 tons net register or thereabouts, now on passage Tal-tal to Rotterdam and PARROTT & CO., of San Francisco, Merchants and Charterers.

1. That the said vessel being kept tight, staunch, strong, and in every way fitted for the voyage shall after discharge of present cargo with all convenient speed proceed to such usual loading berth at ~~ANTWERP~~ ROTTERDAM (always afloat) alongside the rails as may be provided by the Harbour Master, and there receive on board, in the customary manner, from Charterers or agents, a full and complete cargo of say one thousand tons Iron—not unwieldy—and lawful merchandise (~~excluding Coal, Scrap iron and Explosives~~) or Cement, balance Coke, Beans & Girders excluded, which Charterers bind themselves to ship (not exceeding what can be reasonably stowed and carried over and above tackle, apparels, provisions and furniture) [253] completing at the river quay if full cargo cannot be loaded in the docks, and being so loaded shall proceed with dispatch to

SAN FRANCISCO—CALIFORNIA

to discharge at any safe wharf or place as customary within the Golden Gate where vessel can lie always afloat, delivering the cargo there, as directed by Charterers, at three wharves designated by Charterers or their agents, if more than two wharves extra towage incurred to be for Charterer's account.

2. Freight to be paid at the rate of Eighteen Shillings (18/=) per ton of 2240 lbs. delivered on final and true delivery of the cargo; payable in

United States gold coin at the rate of \$4.80 to the £ sterling.

3. Charterers to pay all dues and duties on the cargo, and the vessel all other charges excepting lighterage, if any, which is to be at the risk and expense of Charterers. The Master or Owners to have an absolute lien on cargo for freight, dead freight, demurrage, damages for detention or delay, and average, if any, under this charter. Charterers to supply such cargo as will enable vessel to be loaded to the proper marks or dead freight to be paid. Only such cargo to be tendered as will go down vessel's hatches and any piece over two tons to be put on board and taken out at risk of Charterers and any extra expense to be paid by them. The vessel to proceed to any crane as required. Charterers' responsibility to cease on completion of loading. Dunnage or mats, if required, to be furnished by Owners.

4. Should vessel not ~~arrive at port of loading~~ at or
be ready to load
before sundown on 31st January 1910 Charterers to have the option of cancelling or maintaining this charter.

5. Charterers to be allowed Twenty (20) weather working days [254] for loading, with two days extra, to be computed from the time vessel is in loading berth as provided above, with inward cargo and/or ballast finally discharged and the hold clean and ready for cargo, the Master having given 24 hours' notice thereof in writing to Charterers or agents. Sundays, legal holidays and time occupied

in shifting not to be counted as lay days for loading or discharging.

6. Cargo to be brought to and taken from alongside vessel at Charterers' risk and expense. Stiffening to be supplied by Charterers at ~~Antwerp~~ Rotterdam after seven days' notice has been given by Master of vessel's readiness to receive same, or lay days to count. Time occupied in taking stiffening not to count as lay days.

7. Owners to furnish a certificate from a competent surveyor of vessel's seaworthiness and condition to carry general cargo.

8. Lay days at port of loading not to commence before 1st December next except at Charterers' option.

9. Vessel to be discharged as customary at the average of not less than 100 tons per weather working day after vessel is in berth as directed by Charterers and ready to discharge, notice thereof having

10. ~~In the event of cargo being discharged at the average rate of not less than 150 tons per day, freight to be reduced three pence per ton. If discharged at the average rate 200 tons as above, freight to be reduced six pence per ton.~~

11. Demurrage to be paid vessel for each and every day used in loading or discharging beyond time provided above, at the rate of three pence per net register ton per diem.

12. The act of God, perils of the sea, fire, barratry of the Master or crew, enemies, pirates, assailing thieves, arrest and [255] restraint of princes,

rulers and people, collisions, stranding and other accidents of navigation excepted even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner: also time lost through civil commotions, floods, frosts, snow, ice, detention of lighters or on the railway bringing cargo from works, storm, fog, accidents, strikes, lock-outs or any cause beyond the personal control of Owners or *Charters*, with relation to loading or discharging cargo, always mutually excepted throughout this charter.

13. Stevedore to be appointed by Charterers or their agents for loading ~~and discharge~~ of cargo, vessel to be loaded and discharged under the supervision and direction of the Master. Owners to pay for stowage of cargo at rate of one shilling per ton weight and measurement ~~and not exceeding the customary and usual rate for discharging~~; also usual advertising, printing and measurer's charges not exceeding £5.5, and customary rate on labourage at loading port to cover insurance of labourers. Ship's clerks for loading and discharging the cargo to be appointed by Charterers or their agents, cost not to exceed current rates, to be paid by Owners.

14. Should vessel discharge all or part of cargo at any wharf or place where no wharfage is charged, such saving to accrue to the Charterers. Half cost of weighing not exceeding six and one-half cents per ton to be paid by vessel on any cargo that may be actually weighed at port of discharge.

15. Bills of Lading, weight, measure and contents unknown, are to be signed by the Master at

request of Charterers or their agents in accordance with mate's receipts, at any rate of freight as presented by Charterers or agents, provided the same equal the amount of freight due under this charter. Any difference of [256] freight in favour of the vessel, between amount of charter and freight payable at port of discharge, according to Bills of Lading to be settled at port of loading less 6% to cover interest and insurance.

16. Average, if any, to be adjusted and settled in San Francisco as customary, according to York Antwerp rules of 1890. If the vessel puts into a port under average where there is telegraphic communication with Antwerp, the Master to wire Charterer's agents and to address his vessel to their representatives.

17. If required by Owners, Charterers to advance, in cash at ~~Antwerp~~ Rotterdam on sailing, one-third Half of the estimated freight less $7\frac{1}{2}\%$ to cover all charges, Master to sign usual draft for amount advanced payable at first port of discharge at current rate of exchange for cable transfer. In the event of voyage being prolonged beyond six months then ordinary interest extra on the advance is to accrue until freight is earned.

18. Vessel to be consigned to Charterer's agents at port of loading for custom house business paying the usual fee of £5.5 and at port of discharge to PARROTT & CO. or their agents paying a commission of $2\frac{1}{2}\%$ on the amount of freight and \$100 agency fee. ~~PARROTT & CO. have the privilege of chartering the vessel outwards from Pacific coast~~

ports, the owners paying them the customary chartering commission of $1\frac{1}{4}\%$ or ——— if vessel is chartered past them.

19. A Brokerage of $1\frac{1}{4}\%$ on this charter is due by Owners to ANTONY GIBBS & SONS, on completion of loading.

20. If any disputes arise at port of loading same to be settled at Antwerp by arbitration.

21. Penalty for non-performance of this agreement to be estimated amount of freight. [257]

DOLBADARN CASTLE SHIP COY. LTD.

(Sd) R. THOMAS & CO.,

Managers.

By Cable authority of Parrott & Co.,

San Francisco.

(Sd) ANTY GIBBS & SONS,

19/11/09,

As Agents for Charterers. [258]

Respondent's Exhibit "C" [Bill of Lading].

2

CALIFORNIA TRADE BILL OF LADING.

JOHN P. BEST & CO.

General Ship & Forwarding Agents.

ANTWERP.

Sailing Vessels.

Freight Payable at Port of Discharge.

COPY NOT NEGOTIABLE.

.....	cubic feet at	per 40 c. f.	£
.....	"	"	"	40	"
305.210	Kos at 18/-	per ton of 1016	Ko	"	279.4.5
.....	"	"	"	1000	"
			Minimum	"
					£ 279.4.5
			Primage	"
			Disbursements	"
			Primage	"
					£ 279.4.5

SAY:

Two hundred seventy-nine Pounds sterling

four Shillings

five Pence Brt. Stg. **PAY-**

ABLE AT Destination. [259]

SHIPPED in good order and condition by John T. Best & Co., (as agents) on board the good Ship Dolbadarn Castle whereof is Master for this present voyage, Baxter, lying in the port of ~~Antwerp~~ **ROTTERDAM** and bound for San Francisco (Cal.).

D G H Co. 2023 (Two thousand Twenty three)
Sheets.

Kos 315.210

“In transit wholly or part”

—being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition, at the aforesaid port of San Francisco (Cal.) unto Order or to his or their assigns. Average as per York-Antwerp Rules 1890. Freight for the said Goods and primage together, to be paid on delivery, as per endorsement, in cash, without deduction, at the exchange of \$4.85 per pound sterling.

Consignees to pay double freight on all weight found over and above the weight entered on this Bill of Lading, and also any extra expenses incurred in connection with weighing, should the weight be found on landing to be in excess of that entered in Bill of Lading.

The following are the exceptions and stipulations referred to:—The act of God, the King's Enemies loss or damage from fire on board, in hulk or craft, or one shore, arrest and/or restraint of Princes, Rulers and People, Collision, any act, neglect, or default *wathsoever* of Pilot, Master or Crew in the management or Navigation of the Ship, and all and every danger and accidents of the Seas, Canals, and Rivers, and of navigation of whatever nature [260] or kind always mutually excepted. The vessel to have liberty to call at any ports in any order to sail without pilots and to tow and assist vessels in dis-

tress, and to deviate for the purpose of saving life or property.

The Ship is not liable for leakage, breakage, loss or damage by heat, sweat, rust, or decay, unless occasioned by improper stowage.

The Ship will not be liable for gold, silver, bullion, specie, jewellery, precious stones, or precious metals, unless Bills of Lading are signed for such goods, and the value declared therein.

If goods of a dangerous nature are shipped without being previously arranged for, they are liable to be thrown overboard, and their loss as well as any loss or damage to the Ship or cargo will fall upon the Shippers or Owners of such goods.

The Master is to deliver the Goods with all reasonable despatch; and the consignees are to be ready to receive them within forty-eight hours after the Ship commences to unload, otherwise the Master or Agent may discharge and store them at the expense and risk of the Owners of the Goods.

In witness whereof, the Master, Owner or Agent, of the said Ship, has signed three Bills of Lading, exclusive of the Master's copy, all of this tenor and date, one of which being accomplished, the others to stand void.

Weight, measure and contents, unknown.

Dated in ~~Antwerp~~ Rotterdam 19th February, 1910.

J. B. [261]

Respondent's Exhibit "E" [Bill of Lading].

5

CALIFORNIA TRADE BILL OF LADING.**JOHN P. BEST & CO.****General Ship & Forwarding Agents.****ANTWERP.****Sailing Vessels.****Freight Payable at Port of Discharge.**

..... cubic feet at	per 40 c. f.	£
..... " " "	" 40 "	"
499.500 Kos at 18/- per ton of 1016 Ko	"	442-9-5
..... " " " " 1000 "	"	"
	Minimum	"
		<hr/>
		£ 422-9-5
	Primage	"
	Disbursements	"
	Primage	"
		<hr/>
		£422:9:5
		<hr/>

SAY:**Four hundred & forty-two Pounds sterling****nine****Shillings****five****Pence Brt. Stg. PAY-****ABLE AT Destination. [262]**

SHIPPED in good order and condition by the
Societe Anonyme de Niel-on-Rupell on board the
 good Ship "**Dolbadarn Castle**" whereof is Master
 for this present voyage, **Baxter**, lying in the port of

~~Antwerp~~ Rotterdam, and bound for San Francisco (Cal.)

LABEL JOSSON. 2775 (Two thousand seven hundred and seventy five) Barrels Cement Kos 499.500.

In transit wholly or part.

—being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition, at the aforesaid port of San Francisco unto order or to his or their assigns. Average as per York-Antwerp Rules 1890. Freight for the said Goods and primage together, to be paid on delivery, as per endorsement, in case, without deduction, at the exchange of \$4.85 per pound sterling.

[Stamped across face of above paragraphs:
“COPY NOT NEGOTIABLE.”]

Consignees to pay double freight on all weight found over and above the weight entered on this Bill of Lading, and also any extra expenses incurred in connection with weighing, should the weight be found on landing to be in excess of that entered in Bill of Lading.

The following are the exceptions and stipulations referred to:—The act of God, the King's Enemies, loss or damage from fire on board, in bulk or craft, or one shore, arrest and/or restraint of Princes, Rulers and People, Collision, any act, neglect, or default *wathsoever* of Pilot, Master or Crew in the management or Navigation [263] of the Ship, and all and every danger and accidents of the Seas,

Canals, Rivers, and of navigation of whatever nature or kind always mutually excepted. The vessel to have liberty to call at any ports in any order to sail without pilots and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

The Ship is not liable for leakage, breakage, loss or damage by heat, sweat, rust, or decay, unless occasioned by improper stowage.

The Ship will not be liable for gold, silver, bullion, specie, jewellery, precious stones, or precious metals, unless Bills of Lading are signed for such goods, and the value declared therein.

If goods of a dangerous nature are shipped without being previously arranged for, they are liable to be thrown overboard, and their loss as well as any loss or damage to the Ship or cargo will fall upon the Shippers or Owners of such goods.

The Master is to deliver the Goods with all reasonable despatch and the consignees are to be ready to receive them within forty-eight hours after the Ship commences to unload, otherwise the Master or Agent may discharge and store them at the expense and risk of the Owners of the Goods.

In witness whereof, the Master, Owner, or Agent, of the said Ship, has signed three Bills of Lading, exclusive of the Master's copy, all of this tenor and date, one of which being accomplished, the others to stand void.

Weight, measure and contents, unknown.

, Dated in ~~Antwerp~~ Rotterdam 19th February, 1910.

J. B. [264]

[Respondent's Exhibit "I" [Declaration of Stevedore].

Rotterdam, 22nd. February 1910 191
Tulpstraat 17.

A. A. HOOGERWERFF,
Stevedore.

Telephone 3054.

The Undersigned A. A. Hoogerwerff, licensed stevedore at the Port of Rotterdam, herewith declares to have loaded and stowed the cargo now on board of the British barque "DOLBADARN CASTLE" Captain John Baxter, consisting of Steelplates, Steelbars, Cement in casks, Pigiron and Coke.

That said cargo has been stowed in accordance with the rules to effect proper stowage and as is customary at this port and I further declare that to the best of my knowledge the said vessel is in an efficient state to make the intended voyage to San Francisco.

Licensed stevedore,

A. A. HOOGERWERFF. [265]

[Certificate of U. S. Commissioner to Depositions of John Baxter et al.]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, James P. Brown, Esq., a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing depositions is that the testimony of the

witnesses John Baxter, John Owen, Jan Olsson and Robert Conchar is material and necessary in the cause in the caption of the said depositions named and that they are bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Thursday, September 15th, and Friday, September 16th, 1910, I was attended by L. T. Hengstler, Esq., proctor for the libellant, and Ira S. Lillick, Esq., proctor for the claimant, and by the witnesses, who were of sound mind and lawful age, and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Clement Bennett and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

Accompanying the depositions and annexed thereto and forming a part thereof are Respondent's Exhibits "A," "B," "C," "D," "F," "G" and "H" ("F" and "G" being retained in the possession of counsel, to be produced at the time of the trial), introduced in connection therewith and referred to and specified therein. [266]

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the court for which the same were taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 28 day of September, 1910.

[Seal]

JAS. P. BROWN,
United States Commissioner, Northern District of
California, at San Francisco.

[Endorsed]: Filed Sep. 28, 1910. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [267]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,
Libellant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, etc.,

Respondent.

Opinion.

ANDROS & HENGSTLER, Proctors for Libellant.

IRA S. LILLICK, Proctor for Respondent.

This is a libel for damage to a cargo consisting of cement and steel plates, shipped from Rotterdam

to San Francisco. The libelant claims that the damage was the result of sweat occasioned by a quantity of coke constituting a portion of the cargo. The respondent claims that the damage was caused by sea water entering through seams in the deck and through the ventilator during extraordinarily heavy weather encountered on the voyage. The vessel was under charter to libelant, who selected the whole cargo, including the coke, so that no negligence may be imputed to the ship from the fact itself that coke formed a part of the cargo. The bill of lading provides that the cargo shall be delivered in like good order and condition as when received subject to certain exceptions among which are the "Act of God, and all and every danger and accidents of the seas." It further provides that the ship is not liable "for damage by heat, sweat or rust unless occasioned by improper stowage." The damage complained of was the caking of the [268] cement, and the rusting and pitting of the steel plates. This damage both to the cement and to the steel plates was occasioned by some form of moisture. If caused by the entrance of sea water, the ship cannot be held responsible, because the evidence is clear that whatever sea water entered did so by reason of the fact that the ship became strained by the storms and heavy seas encountered by her, and the damage falls within the first exception above noted. If the damage was caused by rust or sweat, then under the second exception the ship is not liable unless such sweat or rust was occasioned by improper stowage. The evidence offered by libelant tended to show that the

moisture which caused the caking of the cement and the rusting and pitting of the plates was the result of sweat arising from the cargo of coke. If it be conceded that this fact is established, the burden of proving that the damage from such sweat was occasioned by improper stowage is upon the libelant. For once the damage is brought within the exceptions of the bill of lading, the ship is exonerated unless the libelant show that notwithstanding such exception the ship is liable because of some negligence; in this case—the negligence of improper stowage. The testimony is very conflicting both as to the cause of the damage and the propriety or impropriety of the stowage. It appears, however, that the coke was stowed in the fore and after parts of the vessel, while the general cargo was carried amidships. The coke was separated from the general cargo by bulkheads made of boards placed one above the other, not dovetailed, but closely fitted, the whole being lined on the side next to the coke with dunnage mats. Respondent's witnesses testified that the boards were so closely fitted that daylight could not be seen through them, while the witnesses for libelant testified that [269] there were frequent interstices between the board and a considerable space between the top of the bulkheads and the deck. The bulkheads, however, were better ones for the purpose intended, than those generally in use at the time, and on the whole case I am not prepared to say that the stowage was not proper. My conclusions therefore are:

1. That part of the damage at least was due to sea

water forced through the deck and ventilator and is excused by the exception in the bill of lading covering "all and every danger and accidents of the seas."

2. That if any damage was caused by sweat it is excused by the exception covering "heat, sweat or rust" unless such damage were occasioned by improper stowage.

3. That the burden of showing such improper stowage is upon the libelant.

4. That such burden has not been satisfactorily sustained.

5. That for these reasons the libelant is not entitled to recover, and the libel must be dismissed.

January 22d, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 22, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [270]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,
Libelant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

The DOLBADARN CASTLE SHIPPING COM-
PANY, LTD., a Corporation,
Claimant.

Decree.

This cause having been heard on the pleadings and proofs and argued by the proctors for the respective parties, and due deliberation being had in the premises, it is now

ORDERED, ADJUDGED AND DECREED by the Court that the libel filed herein be, and the same is hereby, dismissed with costs to be taxed against the libellant.

Dated: January 24, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 24, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [271]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,
Libellant,

vs.

The British Ship "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

DOLBADARN CASTLE SHIPPING CO., LTD., a
Corporation,
Claimant.

Notice of Appeal.

To Dolbadarn Castle Shipping Co., Ltd., a Corporation, and to Ira S. Lillick, Esq., Its Proctor, and to W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, First Division:

You and each of you, will please take notice that Parrott & Company, a corporation, libelant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Decree of the District Court of the United States for the Northern District of California, entered in said cause on the 24th day of January, 1914.

Dated: February 17th, 1914.

ANDROS & HENGSTLER,
Proctors for Libelant.

Due service and receipt of a copy of the within notice of Appeal is hereby admitted this 17 day of February, 1914.

IRA S. LILLICK,
Proctor for Claimant. [272]

[Endorsed]: Filed Feb. 17, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [273]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,

Libelant,

vs.

The British Bark "DOLBADARN CASTLE," Her
Tackle, etc.,

Respondent.

Assignment of Errors.

The libelant, Parrott & Company, a corporation, hereby assigns errors in the proceedings of the District Court as follows:

1. The Court erred in holding that libelant was not entitled to recover from claimant the damage done to its cargo of cement and steel plates, shipped from Rotterdam to San Francisco.
2. The Court erred in entering the decree that libelant take nothing, and in dismissing its libel.
3. The Court erred in holding that part of the damage at least to libelant's cargo was due to sea water forced through the deck and ventilator of the ship.
4. The Court erred in not holding that, granting that part of the damage at least was due to sea water so as to be excused by the exception in the bill of lading, libelant was nevertheless entitled to recover the damage due to other causes.

5. The Court erred in holding that, if the damage was caused by rust or sweat, the ship was not liable unless [274] such sweat or rust was occasioned by improper stowage.
6. The Court erred in holding that the burden of improper stowage such as to cause sweat or rust was upon the libelant.
7. The Court erred in holding that, assuming that the burden of improper stowage such as to cause sweat or rust was upon the libelant, such burden has not been sustained by libelant.
8. The Court erred in holding that the burden of proving that the damage from sweat arising from the cargo of coke was occasioned by improper stowage was upon the libelant.
9. The Court erred in not finding, under the evidence, that the stowage of the cargo of the ship was not proper.
10. The Court erred in not holding that, on the whole case, the stowage of the cargo was not proper.
11. The Court erred in not entering its decree that libelant recover the damages suffered by libelant, as alleged and prayed in the libel.

Dated, San Francisco, May 14, 1914.

ANDROS & HENGSTLER,

Proctors for Libelant.

Due service and receipt of a copy of the within

Assignment of Errors is hereby admitted this 15th day of May, 1914.

IRA S. LILLICK,

J. A. O.,

Proctor for Respondent. [275]

[Endorsed]: Filed May 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [276]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,

Libelant,

vs.

The British Ship "DOLBADARN CASTLE," Her Tackle, Apparel and Furniture,

Respondent.

DOLBADARN CASTLE SHIPPING CO., LTD., a Corporation,

Claimant.

Stipulation and Order Concerning Original Exhibits.

It is hereby stipulated and agreed between the proctors for the respective parties hereunto that all the exhibits introduced in evidence at the hearing of the above-entitled cause before the above court, and all the exhibits introduced in evidence before the Commissioner, may be detached from the depositions taken before the Commissioner and may be omitted from the Apostles on Appeal in said cause, and may

be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which the same were respectively introduced before said Court and said Commissioner.

Dated May 23, 1914.

ANDROS & HENGSTLER,
Proctors for Appellant.
IRA S. LILLICK,
Proctor for Appellee.

So ordered. May 26, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 26, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [277]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,
Libelant,

vs.

The British Ship "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

DOLBADARN CASTLE SHIPPING CO., LTD., a
Corporation,
Claimant.

Stipulation [and Order Extending Time to April 17, 1914, to File Apostles on Appeal].

It is hereby stipulated and agreed that libelant in the above-entitled case may have thirty (30) days from date hereof within which to procure the filing in the United States Circuit Court of Appeals for the Ninth Circuit of the apostles and record in said cause, with the certification of the above District Court thereunto attached.

Dated: March 18, 1914.

IRA S. LILLICK,
Proctor for Respondent.

It is so ordered:

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Mar. 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [278]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,073.

PARROTT & COMPANY, a Corporation,
Libelant,

vs.

The British Ship "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

DOLBADARN CASTLE SHIPPING CO., LTD., a
Corporation,
Claimant.

Stipulation [and Order Extending Time to May 18, 1914, to File Apostles on Appeal].

It is hereby stipulated and agreed that libelant in the above-entitled cause may have thirty (30) days from date hereof within which to procure the filing in the United States Circuit Court of Appeals for the Ninth Circuit of the apostles and record in said cause, with the certification of the above District Court thereunto attached.

Dated: April 18, 1914.

IRA S. LILLICK,
Proctor for Respondent.

It is so ordered.

WM. W. MORROW,
Judge United States Circuit Court of Appeals, Assigned to United States District Court.

[Endorsed]: Filed Apr. 22, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [279]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,073.

PARROTT & COMPANY, a Corporation,
Libelant,

vs.

The British Ship "DOLBADARN CASTLE," Her
Tackle, Apparel and Furniture,
Respondent.

DOLBADARN CASTLE SHIPPING CO., LTD., a
Corporation,

Claimant.

**Stipulation [and Order Extending Time to June 1,
1914, to File Apostles on Appeal].**

IT IS HEREBY STIPULATED AND AGREED that libelant in the above-entitled cause may have to and including June 1st, 1914, within which to procure the filing in the United States Circuit Court of Appeals for the Ninth Circuit of the apostles and record in said cause, with the certification of the above District Court thereunto attached.

Dated: May 18th, 1914.

IRA S. LILLICK,
Proctor for Respondent.

It is so ordered.

M. T. DOOLING,
Judge of Court.

[Endorsed]: Filed May 18, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [280]

**[Certificate of Clerk U. S. District Court to Apostles
on Appeal.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed 280 pages, numbered from 1 to 280, inclusive, with the accompanying exhibits, 9 in number (transmitted under separate covers in their original form), contain a full, true and correct transcript of the records and proceedings as the same now remain on file and of record in the Clerk's Office of said District Court, in the cause entitled Parrott & Company, a corporation, vs. The British Bark "Dolbadarn

Castle," her tackle, etc., and numbered 15,073, and which said Apostles on Appeal is made up pursuant to and in accordance with "Praeceptum" (copy of which is embodied in said Transcript), and the instructions of Messrs. Andros and Hengstler, proctors for libellant and appellant herein.

I further certify that the costs of preparing and certifying the foregoing Apostles on Appeal is the sum of One Hundred Sixty-two Dollars and Sixty Cents (\$162.60), and that the same has been paid to me by the proctors for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 28th day of May, A. D. 1914.

[Seal]

W. B. MALING,

Clerk.

By Lyle S. Morris,

CMT.

Deputy Clerk. [281]

[Endorsed]: No. 2430. United States Circuit Court of Appeals for the Ninth Circuit. Parrott & Company, a Corporation, Appellant, vs. Dolbadarn Castle Shipping Company, Limited, a Corporation, Claimant of the British Bark "Dolbadarn Castle," Her Tackle, Apparel and Furniture, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed May 28, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY

(a corporation),

Libelant and Appellant,

vs.

DOLBADARN CASTLE SHIPPING
COMPANY, LIMITED (a corpora-
tion) claimant of the British bark
“Dolbadarn Castle”, her tackle, ap-
parel and furniture,

Claimant and Appellee.

BRIEF FOR APPELLANT.

LOUIS T. HENGSTLER,

ANDROS & HENGSTLER,

Proctors for Libelant.

Filed this.....day of February, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

F. D. Monckton,
Clerk.

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No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY

(a corporation),

Libelant and Appellant,

vs.

DOLBADARN CASTLE SHIPPING

COMPANY, LIMITED (a corporation) claimant of the British bark
“Dolbadarn Castle”, her tackle, apparel and furniture,

Claimant and Appellee.

BRIEF FOR APPELLANT.

I. Statement of the Case.

Libelant is the consignee of consignments of cement and steel plates which arrived in claimant's ship in a damaged condition. The cement, on arrival, was caked, and the steel plates were pitted. The District Court decreed in favor of the ship, and libelant appeals. The following facts are admitted by the pleadings:

1. That about February 19, 1910, at Rotterdam, the shipper shipped, *in good order and condition*, 2775 barrels of *cement*, on the bark "Dolbadarn Castle", then employed as a general ship in the transportation of cargoes, to be transported to San Francisco, there to be delivered in like good order and condition, subject to the terms of the bill of lading (Libel art. II; Ans. art. II).

2. That about the same day, at Rotterdam, the shipper shipped on said bark, *in good order and condition*, 2023 *sheets or steel plates*, to be transported to San Francisco, there to be delivered in like good order and condition, subject to the terms of the bill of lading (Libel art. II; Ans. art. II).

3. That said consignments were *not delivered in like good order and condition*, but *were damaged while the goods were on board and in the custody of said bark* (Answer art. III).

These admitted facts constitute a *prima facie* case in favor of libellant.

The affirmative *defense* of claimant is set forth in article IV of its answer as follows:

"IV. The claimant avers that the loss and damage referred to in said libel were *caused solely and entirely by the force of the winds and waves and perils of the sea*; which, notwithstanding that the said bark had been and was up to that time in all respects seaworthy and properly stowed, so injured and strained her that the *seawater* during a long season of tempests and gales was forced through her decks into and upon the cargo referred to, *wetting and damaging the same*; that the master and

crew of said vessel took every precaution for the protection of said cargo, and that the damage thereto was caused by the *act of God*, and without fault on their part or insufficiency on the part of said vessel.”

II. Specification of Errors Relied Upon.

The fundamental errors of the Court below consist first, in its ruling that, on the issues raised by the pleadings, *the burden of showing improper stowage is upon the libelant*, and second, in not ordering a decree in favor of libelant for that part of the damage which was not due to sea perils. All the other errors more specifically assigned by appellant (Apostles pp. 317, 318) are the direct consequence of these errors, and appellant relies upon each of the said specified errors.

III. Argument of Appellant.

A. THE BURDEN OF PROOF IS ON CLAIMANT TO SHOW AFFIRMATIVELY THAT THE CAUSE OF THE DAMAGE WAS PERILS OF THE SEA.

1. The questions before the Court are controlled by *The Folmina*, 212 U. S. 354. In that case the principle settled in *Clark v. Barnwell*, 12 How. 272, was reaffirmed to the effect that

“Where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, *the burden*

lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible."

In the case at bar the pleadings admit:

(i) that the goods were received in good order on the "Dolbadarn Castle", under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition;

(ii) that the goods were damaged on the voyage.

The case is therefore squarely within the facts upon which the settled principle is predicated, and there can be no doubt that the burden lay upon the claimant to show that the damage was caused by one of the perils for which the claimant was not responsible.

2. This, indeed, was the theory upon which the case was in fact tried. The libellant rested upon its *prima facie* case made out by the pleadings, relying upon the principle that, "when goods are damaged while in the possession of a ship, there is a *prima facie* presumption that the injury was caused by the fault of the ship rather than by perils of the sea" (Apostles p. 39). "Our position under the pleadings is, we rest with our *prima facie* case" (p. 42). Whereupon claimant proceeded with its defense.

3. Claimant's affirmative defense was *that the damage was caused solely by perils of the sea*; that the bark was in all respects seaworthy and prop-

erly stowed; that sea water, entering through the decks of the bark, wetted and damaged the cargo; and that the damage was caused without fault on the part of the master and crew (Answer art. IV). Claimant had, therefore, the burden of proving its defense and to show

First. That the ship was “seaworthy and properly stowed”.

Second. That the damage arose from a peril of the sea.

If the evidence, on any of these items of claimant’s defense, remains in doubt, the libellant is entitled to a decree in its favor.

As Judge Morrow said, in the case of *The Queen*, 78 Fed. 155, 164:

“Can it be said that a carrier against whom a prima facie case of negligence has been made out, discharges the affirmative duty of bringing himself within one of the exceptions of the contract of affreightment by simply leaving the question as to whether or not the damage was caused by one of the excepted perils or dangers in doubt? I think not. The carrier does not thereby overcome the presumption of negligence which the law raises against him. He cannot absolve himself from blame by merely showing such a state of facts that the court is unable to deduct how and in what manner the damage has arisen. He must show affirmatively that the damage was caused by a peril of the sea or other cause excepted by the contract of affreightment, and this he must establish satisfactorily. He cannot leave the matter in doubt. As was aptly said in *The Compta*, 14 Sawy. 375, Fed. Cas. No. 3,069:

‘The carrier to make good his defense is bound to show that the damage arose from a peril of the sea. It is not enough for him to show that it might have arisen from that cause. He must prove that it did’.”

B. THE EVIDENCE FAILS TO SHOW THAT THE DAMAGE WAS CAUSED BY PERILS OF THE SEA.

1. *The evidence on behalf of the claimant fails to show that any of the damage was caused by perils of the sea.*

W. H. Stewart testified that the pitting of the steel plates “was in a large measure due to salt water” (p. 45).

Even if this testimony is accepted as true, it contains an admission that some of the damage to the steel plates was not caused by salt water; and it also falls short of proving that the pitting of the steel plates was caused by *perils of the sea*.

Thomas Wallace testified for claimant as to damage to the *cement*. For reasons hereafter stated, his testimony is not entitled to much credit; but even if accepted, it proves little. He says:

“Q. What in your opinion was the cause of the caking?

A. I then made the test immediately on the barrels and on the hoops for salt water.

Q. What did you find?

A. It showed salt water very plainly” (p. 63).

This does not show that he made any examination at all of the cement itself. The Court may take judicial notice of the fact that barrels and hoops coming around Cape Horn in a sailing ship, and stowed directly underneath the hatches, will always show the traces of salt water.

The testimony of these two witnesses is the only direct testimony tending to show that the caking of the cement and the pitting of the plates had *any connection with sea water*.

It is respectfully submitted that this testimony is of the slightest possible weight. Assuming it to be true, it follows, without considering libelant's testimony at all, that *some* of the damage to the steel plates *was* in fact caused by other causes than the cause pleaded in claimant's defense; and that *all* of the damage to the cement may have been caused by causes which do not excuse claimant. Libelant's evidence is insufficient to show even that the damage was caused by *sea water*; a fortiori it is insufficient to prove that it was caused by the excepted cause of *perils of the sea*.

Again, if we assume that the damage to the cement and the steel plates was due to sea water, there was still a failure to prove that the presence of sea water in the ship was occasioned by an accident of the sea, and not by negligence (*The Folmina*, 212 U. S. 354). The captain's theory was that *water going down the ventilators* damaged the plates, and "*water that came through the deck*

damaged the cement'' (p. 230). The mate's testimony, on direct examination, is:

''Q. Who attended to the ventilators coming out?

A. I did, as a rule, and the carpenter.

Q. Do you know what was done as to the opening them and closing them? A. Yes, sir.

Q. What was done?

A. I had to cover them at times in bad weather to keep the water from going down, cover them over at the mouth.

Q. *Do you know whether the main ventilator was open at any time during heavy weather?*

A. *Oh, yes, it was opened, and of course water might have gone down before we covered them''* (p. 246).

This testimony of the mate makes it doubtful, to say the least, whether *perils of the sea* had anything to do with the damage to the steel plates. Had libelant not produced any evidence whatsoever on this point, but left claimant at the mercy of its own showing, as disclosed by the pleadings and evidence, libelant would be entitled to a decree.

But the evidence of libelant removes the cause of the damage from the sphere of doubt and shows by clear preponderance that the damage was not produced by sea water, much less by perils of the sea.

The mere fact that the evidence of claimant, when taken alone, leaves the cause of the damage in doubt, entitles libelant to a decree; but when the evidence for libelant is also considered, it appears clearly that the cause of the damage to the cargo

was not any peril of the sea, but the excessive sweat of the coke which was permitted to permeate the general cargo-compartment and was aggravated by insufficient ventilation.

2. *The evidence on behalf of libellant shows clearly that the caking of the cement and pitting of the steel were not caused by perils of the sea (nor even salt water), but by causes for which claimant is not excused. (Coke sweat and poor ventilation.)*

Captain R. F. Pillsbury testified, as a conclusion from his observations and examination as an expert surveyor, that the sweat from the coke produced two-thirds of the damage to the cement, and that the damage to the steel plates was caused *altogether* "by the sweat from the coke, carrying some chemical contained in the coke" (pp. 105, 106). In the opinion of this expert the *means of ventilation* of the general cargo were inadequate, and this fact contributed to the damage (p. 105). "I would put a ventilator in the fore end of the general cargo compartment and one in the aft end" (p. 118). The principal damage to the steel was "pitting", caused by a chemical substance. "I made some tests myself, and the salt reaction on those that I tested was so very slight that I recommended a chemist more expert in such matters than myself to make an examination" (p. 106).

P. W. Tompkins, the chemist employed by libellant, who analyzed the damage, gave the opinion, as

the result of his examination, that "the predominating evidence is against the supposition that the iron plates have been damaged by salt water (p. 187); and that the cement was "unmistakably not salt water damaged" (pp. 177, 178). The pitting of the steel plates was produced by carbon dioxide, in conjunction with water. "Carbon dioxide in the presence of water has a very corrosive effect" (p. 179).

Franklin Riffle, an expert on the nature of steel plates, who had had experience with this class of goods as manager in charge of the iron and steel department of Dunham, Carrigan & Hayden Company, testified that the plates were more or less pitted; that the damage consists in the "pitting" of these goods; that rusting alone is not such damage as makes them unmerchantable. "We accepted all the plates that were not pitted or damaged in any way after removing the rust, scraping it off" (p. 122). The pitting was "all over the plate" (p. 123). "There was evidently some corrosive agency at work there" (p. 123).

Captain Fred G. Wilson, the stevedore who discharged the ship, testified, as his conclusion, based upon his observations in the hold of the ship, with reference to the damage to the cement as follows:

"The natural sequence of the stevedore would be a supposition it came from the sweat of the coke.

The COURT. Q. Is that the conclusion you came to?

A. The conclusion I came to it was caused by the sweat that rises from the coke" (p. 140).

He also testified on cross-examination:

“Mr. LILLYCK. Captain Wilson from his experience in this port and from his experience from unloading and discharging vessels of the type of the ‘Dolbadarn Castle’ is able to speak with absolute certainty as to these ventilators * * * I wish to ask him this question:

Q. Are not these vessels of the type and size of the ‘Dolbadarn Castle’ equipped usually with the same character of ventilator?

A. Well, to the best of my belief these vessels are not properly ventilated for carrying large cargoes of coke and cement and perishable iron; that is to the best of my belief. I mean for that class of vessel * * * (pp. 148-149).

H. L. Van Winkle, an importer of iron and steel who had been engaged in that business for thirty-five years, testified as follows:

“Q. How did the damage on these particular steel plates compare with the damage which you have known to be created by salt water on steel plates?

A. It seemed to be very much different in that the rust was very black; it was rather different in appearance as salt water rust is rather yellow; this being entirely of a different nature it attracted my attention” (p. 191).

3. *There is furthermore an inherent probability of the correctness of the theory of libellant;*

and a corresponding improbability of the theory upon which claimant relies as a defence. The evidence shows that the damage to both the cement and the steel plates was spread “all over”. If

claimant's theory were true, the damage would have been localized; it would have been confined to the cargo underneath the two weak spots in the deck of the ship, viz. under the ventilator, and under the leak in the decks, around the main mast (p. 105). The fact that the damage was distributed throughout the whole compartment is sufficient to disprove the theory upon which claimant's defence is based.

4. *The findings of the Court are insufficient to support the decree.*

a. There is no finding as to the seaworthiness of the ship or the propriety of the stowage.

On the subject of damage the Court's findings are:

"The damage complained of was the caking of the cement, and the rusting and pitting of the steel plates. This damage of both to the cement and to the steel plates was occasioned by some form of moisture (p. 312). The testimony is very conflicting both as to the cause of the damage and the propriety or impropriety of the stowage. * * * On the whole case I am not prepared to say that the stowage was not proper" (p. 313).

The "*conclusion*" that "part of the damage at least was due to sea water forced through the deck and ventilator and is excused by the exception in the bill of lading covering 'all and every danger and accidents of the seas'" (pp. 313, 314) is a conclusion from the premise that the libelant should have accounted for the cause of the damage. If this

Court agrees with us that, on the authority of the *Folmina* case and numerous other decisions, the premise is incorrect, it follows that the conclusion can have no weight.

b. But if the Court's "conclusion" were considered as an independent finding of fact, it is respectfully submitted that libelant, even under such a finding, is entitled to a decree for that part of the damages which was not due to danger of the seas. If part of the damage was due to sea water and is excused by the exception, it follows by inference that part of the damage was *not* due to sea water and is not within the exception, and therefore not within the defence. For the latter part of the damage libelant is clearly entitled to a decree.

c. Even that part of the damage which may have been due to sea water forced through the deck and ventilator is not covered by the exception of perils of the sea in the absence of a finding or proper evidence of the seaworthiness of the ship. If the sea water was forced through a leaky deck or a defective ventilator, claimant is liable for the consequent damage. Hence for that part of the damage also libelant is entitled to a decree.

C. THE EVIDENCE SHOWS, BY CLEAR PREPONDERANCE, THAT CLAIMANT NEGLIGENTLY FAILED TO SEGREGATE LIBELANT'S PERISHABLE CARGO FROM THE DANGEROUS COKE CARGO BY A SUFFICIENT BULKHEAD.

The voyage round Cape Horn is notorious for extreme weather conditions. A vessel should be

prepared to safely meet these expected conditions, both as to her equipment, and as to the stowage of her cargo. The question of the bark's seaworthiness at the beginning of the voyage is left by claimant largely to presumption and surmise; but on the issue of proper stowage of the cargo the evidence preponderates decidedly in favor of libellant. Claimant, in its pleading, recognizes that it should prove affirmatively "that the said bark had been and was * * * in all respects *seaworthy and properly stowed*" (Answer art. IV). On this subject the Court, in its findings, is "not prepared to say that the stowage was not proper", but *does not find that the stowage was proper*. Assuming *the evidence*, on the subject of proper stowage, to be evenly balanced, the libellant is entitled to a decree; for the whole defence of perils of the sea rests upon the assumption that the ship is seaworthy and able to meet the perils to be expected.

As said in *The Edwin I. Morrison*, 153 U. S. 199, 211:

"Perils of the sea were excepted by the charter party but the burden of proof was on the respondent to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed."

The ship must be seaworthy for that particular voyage and that particular cargo. The evidence, on the issue of the stowage of the cargo for the

intended voyage, is not evenly balanced, but shows by clear preponderance that the cargo was not properly stowed, and that the damage was caused by that fact. The greater part of the cargo was coke, a notoriously dangerous cargo if it comes in connection with perishable cargo like the shipments which were damaged in this case.

The conditions of this case were analogous to those in the case of *The Jean Bart*, 197 Fed. 1002, and the principles followed by Judge Dietrich in the latter case apply to the case at bar. In both "a large quantity of coke constituted a part of the cargo". The Court said:

"While it is not shown, at least not by direct proof, that it was wet when received, it is well known that coke, by reason of its capacity to absorb moisture under certain conditions and throw it off in the form of vapor under others, is a most effective and dangerous agency in producing sweat" (p. 1004).

In both cases the master of the ship was bound to take knowledge of this danger; he knew when he received the other consignment (in the case at bar the steel plates) that it was susceptible to injury from moisture; and that

"the master and owner were further bound to take cognizance of the fact that the voyage about to be undertaken was * * * the longest commercial voyage of the modern world, in the course of which there are likely to be great and sudden changes of temperature, a condition highly conducive to sweating of hold and cargo. These known conditions imposed the duty to take precautions and to use care rea-

sonably commensurate with the perils to be anticipated" (p. 1004).

Now what does an examination of the evidence show, in this case, on the issue of stowage?

The Bulkheads.—1. *Testimony for the claimant:* The only witness who testified as to the proper segregation of general cargo from coke, on behalf of claimant, was Thomas Wallace, who attempted to substantiate his "Port Warden's Certificate", previously issued while employed by the ship. The "expert" testimony of this witness is valueless, as appears from a remark of the Court, made in response to an objection by counsel for claimant:

"You put this witness on the stand to testify that a single bulkhead with matting was proper stowage to separate coke from other cargo. In the former trial he testified that the only proper way was by double bulkheading and tar paper between" (p. 81).

But even this witness testified that the bulkheads *were not air tight* (p. 68); also that "a ship that contains coke is likely to sweat more than a ship that does not contain coke" (p. 73).

The master of the ship, as might be expected, testified, in his deposition, to the ideal perfection of his bulkheads: "I don't know there was ever bulkheads come into San Francisco in such a perfect condition as ours were" (p. 225). "And arrived here in perfect condition" (p. 226).

The latter testimony was given in the face of the admission of counsel for the ship that "the pitch-

ing or straining of the vessel", going around the Horn, would "absolutely make it impossible to have an air-tight compartment unless it was a part and parcel of the ship" (p. 147).

The ship's *carpenter*, on deposition, testifies that the boards of the bulkhead were not tongue-and-groove, but just laid one on top of the other, nailed to stanchions. He, as a carpenter, is forced to admit that such rough woodwork in houses shrinks and warps, but is very reluctant to admit that it shrinks in bulkheads in the hold of ships, even though they pass twice through the equator on the voyage (pp. 278, 279).

Claimant's expert, Meyer, called for the purpose of showing that air- or water-tight bulkheads are not necessary to protect such cargo as cement or steel against the ravages of coke-sweat, candidly admits: "I only wish they were water and air-tight sometimes" (p. 163).

2. *Testimony for libelant*: Mr. Hilding, employed by libelant, went to inspect the ship upon her arrival. He testifies:

"I saw the bulkheads and I noticed that the boards, in some places, were not tight, so that in some places you could put your finger through. * * * Furthermore, on top, right below the deck, there was a space probably in some places 3, 4 or 5 inches, between the deck and the bulkhead" (pp. 126, 127).

Captain Wilson, the stevedore who discharged the ship, "saw that there were crevices in the bulkhead

and that the coke was in close proximity to the bulkhead; * * * I saw that the bulkhead was not what we stevedores call a water-tight bulkhead" (p. 139). His conclusion from what he observed in the hold of the vessel was that the damage to the cement was caused "by the sweat that rises from the coke" (p. 140). In his opinion bulkheads should be "put up paper-lined, with oil paper, where they were carrying perishable cargo in close proximity with the coke" (pp. 140, 146).

G. Loken gives it as his opinion, based upon an experience of seventeen years with hundreds of vessels that carried coke cargoes, that the only way safe to other cargo "would be by bulkheading off the coke from the other cargo by good boards, battenning it, and tar paper" (p. 154).

W. F. Mills, called as an expert by *respondent*, admitted that the effect of heat, as the vessel passes through the tropics, upon a bulkhead such as described by *respondent's* evidence, would be to shrink the boards so that it probably would have the effect of making openings between the joints.

"It would, yes; of course that would depend a great deal upon the thickness of the bulkhead. If it was a thin bulkhead it would have more cause to shrink and swell than it would if it was thick. On 3-inch timbers the heat and moisture would have little effect on the swelling or shrinking" (p. 100).

The evidence shows that the timbers used in the bulkhead were $\frac{3}{4}$ or 1 inch timbers.

Captain Pillsbury, admittedly an expert on the stowage of cargoes (p. 100), testified that he made a survey of the vessel, and examined the bulkheads separating the cement from the coke (p. 101).

“I found the bulkheads to be built of ordinary boards, laid one on top of the other, rough boards. I could see spaces where air and moisture and daylight, if the other side were open, so that I could see through it; on top, under the deck, I put my hand in several places where the bulkhead did not fit closely up to the deck” (p. 102).

“I saw a few damaged mats on every bulkhead; some of those were displaced” (p. 103).

This was before the cargo was discharged. The witness testified that the bulkhead was not sweat-tight. As to the nature of coke as a cargo, and the consequent necessity of sweat-tight bulkheads, he says:

“Many times it produces a very bad sweat, so many times that in my opinion it is dangerous to carry it in the compartment with dry cargo” (p. 104).

“In the most cases that have come under my observation there has been damage to other cargo stowed in the same ship with the coke, caused by the sweating of the coke” (p. 105).

In the opinion of this expert, based upon his personal examination of the cargo, two-thirds of the cement damage, and the whole of the damage to the steel, was caused by the sweat from the coke and insufficient ventilation.

To Summarize.

First: Under the admissions of the answer the burden of proof was on claimant to show that the ship was seaworthy and properly stowed; and that the damage to libelant's cargo was caused by perils of the sea.

Second: The claimant has not shown that the ship was seaworthy and properly stowed.

Third: The claimant has not shown that the damage to libelant's cargo was caused by perils of the sea.

Fourth: The conclusion of the Court that "part of the damage at least was due to sea water" falls short of being a finding that any part of the damage was caused by perils of the sea. Even if it were such a finding, it would by implication admit that *part* of the damage was *not* due to sea water, and therefore not caused by perils of the sea. The latter part of the cargo would, at any rate, not be within the protection of the exceptive clause of the Bill of Lading, and libelant is—from any point of view—entitled to a decree for the latter part.

Fifth: The claimant did not claim in its defence, nor does the Court find, nor does the evidence show, that any part of the damage was caused by ship's sweat or that kind of "sweat" which, within the meaning of the ordinary bill of lading clause, would excuse the ship.

Sixth: The evidence shows, by exceptionally clear preponderance, that the damage to libelant's

cargo was caused directly by coke-sweat, and that the action of the coke-sweat was due to the improper stowage of perishable cargo in the proximity of dangerous cargo, without proper protection of the perishable cargo.

It is respectfully submitted that the decree of the District Court should be reversed, and that a decree should be ordered for libelant for all its damages.

Dated, San Francisco,
February 17, 1915.

LOUIS T. HENGSTLER,
ANDROS & HENGSTLER,
Proctors for Libelant.

No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY

(a corporation),

Appellant,

vs.

DOLBADARN CASTLE SHIPPING
COMPANY, LIMITED (a corpora-
tion) claimant of the British bark
"Dolbadarn Castle", her tackle, ap-
parel and furniture,

Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLICK,
Proctor for Appellee.

Filed this *day of March, 1915.*

Filed

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FRANK D. MONCKTON, *Clerk.*

F. D. Monckton, *Deputy Clerk.*
Clerk.

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BRIEF FOR APPELLEE.

We shall in our reply to the brief for appellant discuss in the same order in which they are made the points upon which appellant bases its claim that the decision of the lower Court should be reversed.

I.

Statement of the Case.

Appellant's statement of the facts admitted by the pleadings is correct, insofar as it states a part

of these facts (with the exception that claimant did not admit in its answer that the steel plates were shipped in good order and condition), but to the facts so admitted by the pleadings should be added the following:

The bills of lading, copies of which were attached to the libel and marked "Exhibit A" and "Exhibit B", provided (p. 11 and p. 15) that the cement and steel therein mentioned should

"be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition, at the aforesaid port of San Francisco unto order or to his or their assigns."

Among other exceptions therein mentioned were (p. 12 and p. 15):

"The act of God * * * any act, neglect, or default whatsoever of Pilot, Master or Crew in the management or Navigation of the Ship, and all and every danger and accidents of the Seas, Canals and Rivers, and of Navigation of whatever nature or kind always mutually excepted."

In addition to the foregoing exceptions were the following (p. 11 and p. 15):

"The Ship is not liable for leakage, breakage, loss or damage by heat, sweat, rust or decay, unless occasioned by improper stowage."

It was not admitted by the answer, as we have already stated, that the steel plates were shipped in good order and condition, but on the contrary it was alleged (p. 19) that when the steel plates were

received on board the vessel at Rotterdam “the said plates, or a portion thereof, were in a more or less rusty condition.”

Captain Baxter testified (p. 216):

“The mate signed for them, ‘more or less rusty’. On the receipt that was presented to the mate he marked ‘more or less rusty’.

Q. Did you see them yourself?

A. Yes, sir, I did.

Q. You noticed their condition?

A. They were slightly rusty.

Q. Did you mark it so on the bill of lading?

A. I did not.

Q. You did not take any exception to their condition?

A. The bills of lading cover rust, and that was pointed out to me by the charterers’ agent in Rotterdam, and I wanted this clause put on the bills of lading, and they pointed out that clause on the bill of lading, so I signed a clean bill of lading on that account.”

John Owen, the first mate of the vessel, also testified (p. 247) that the steel plates were “more or less rusty” at Rotterdam and said that he “notified it on the ship’s notes”; that is, the receipts he signed for them.

The vessel was under charter to the libelant and the charter provided (p. 297) that the vessel should receive “from charterers or agents, a full and complete cargo of” iron and/or cement, balance coke and that the stevedore should be appointed by the charterers. In other words, the charterers selected the cargo.

The charter also contained the usual stipulations exempting the vessel and its owners from liability for the act of God, perils of the sea, etc.

II.

Specification of Errors Relied Upon.

Under the above heading, appellant boldly states that the Court below committed error in "ruling that, on the issues raised by the pleadings, the burden of showing improper stowage is upon the libelant." We do not so understand the Court's ruling. It was not made solely upon the issues raised by the pleadings; it was made upon the facts also. What the Court did hold was that the evidence showed that the cargo was damaged either by sea water or by moisture resulting from sweat. That under the terms of the bills of lading the vessel was not liable for loss suffered by the cargo owner from sea water because the evidence showed that the entrance of sea water into the hold had been the result of the unusual storms and extraordinarily heavy weather through which the vessel had passed. Nor, as the bill of lading exempted the vessel from such liability, unless due to improper stowage, was the vessel liable for loss suffered by the cargo owner from sweat or rust, unless the cargo owner proved that such sweat, or rust, was the result of improper stowage. In the words of the Court (p. 312):

“The bill of lading provides that the cargo shall be delivered in like good order and condition as when received subject to certain exceptions among which are the ‘Act of God, and all and every danger and accidents of the seas’. It further provides that the ship is not liable ‘for damage by heat, sweat or rust unless occasioned by improper stowage.’ The damage complained of was the caking of the cement, and the rusting and pitting of the steel plates. This damage both to the cement and to the steel plates was occasioned by some form of moisture. If caused by the entrance of sea water, the ship cannot be held responsible, because the evidence is clear that whatever sea water entered did so by reason of the fact that the ship became strained by the storms and heavy seas encountered by her, and the damage falls within the first exception above noted. If the damage was caused by rust or sweat, then under the second exception the ship is not liable unless such sweat or rust was occasioned by improper stowage. The evidence offered by libelant tended to show that the moisture which caused the caking of the cement and the rusting and pitting of the plates was the result of sweat arising from the cargo of coke. If it be conceded that this fact is established, the burden of proving that the damage from such sweat was occasioned by improper stowage is upon the libelant. For once the damage is brought within the exceptions of the bill of lading, the ship is exonerated unless the libelant show that notwithstanding such exception the ship is liable because of some negligence; in this case—the negligence of improper stowage.”

III.

Reply to Argument of Appellant.

A. THE BURDEN OF PROOF IS ON CLAIMANT TO SHOW AFFIRMATIVELY THAT THE CAUSE OF THE DAMAGE BY SEA WATER WAS PERILS OF THE SEA.

Appellant's first subheading under III we have modified by inserting after the word "Damage", the words "By Sea Water", because the Court found that as to the damage caused by sea water we had maintained the burden of proof upon us and brought ourselves within the provision of the bill of lading exempting us from liability therefor on account of the storms encountered by the vessel in her voyage from Rotterdam.

Either proctors for appellant have misunderstood the ruling made by the Court, or, in their anxiety to attempt to distinguish that ruling from the line of authority which warranted it, have tried to make it appear to be in conflict with the ruling upon the question before the Court in *The Folmina*, 212 U. S. 354. We agree with counsel for appellant in stating that the Court in *The Folmina* reaffirmed the principle laid down in *Clark v. Barnwell*, 12 How. 272, that an exception in the bill of lading of "perils of the sea" will not avail a vessel which delivers its cargo damaged by sea water without anything to indicate in any way how the sea water reached it. In the case at bar we *did* indicate how the sea water reached the cargo and the Court found (p. 312):

“The evidence is clear that whatever sea water entered did so by reason of the fact that the ship became strained by the storms and heavy seas encountered by her.”

The lower Court in its decision also reaffirmed the now well settled rule in cases of this character, of which *The Koranna*, 214 Fed. 172, is perhaps the most recent, reported in the bound volumes of the Federal Reporter.

“It is well settled, I think, that, whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libellant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. *The Lennox*, 90 Fed. 308; *The Koingen Luise*, 185 Fed. 478.”

A line of decisions of the Circuit Court of Appeals for the Second Circuit, before which more admiralty causes involving this point have come than any other of our Circuit Courts of Appeal, has firmly established the rule followed by the lower Court in this case. One of their latest decisions is that of *The Good Hope*, 197 Fed. 149. We shall quote from it in extenso on account of the reference appellant has made to the case of *The Folmina*, 212 U. S. 354, for this decision of the Supreme Court is referred to by the Court in *The Good Hope*, supra, and in so doing that Court states that there is nothing in the case which qualifies their previous

decisions, to which previous decisions we will hereafter refer.

In *The Good Hope*, the vessel had jute as a part of her cargo, which jute was badly damaged by "heat" or "heating". There was an exception in the bill of lading freeing the vessel from liability for damage from "heat". The Court said:

"Among the exceptions in the bill of lading are 'heat' (or 'heating') and 'decay', and it is upon these exceptions that claimants rely to excuse the failure of the ship to deliver all the jute received in good condition. Undoubtedly the cause of the decay and loss was 'heat'—the evidence to that effect is undisputed—and heat is an excepted cause. The District Court held that the burden of showing that the heat was not caused by the negligence of the ship was on her. In this conclusion we cannot concur. It is contrary to the decisions of this Court in *The St. Quentin*, 162 Fed. 883, 89 C. C. A. 573, and *The Baralong*, 172 Fed. 220, 97 C. C. A. 24, following our earlier decisions in *The Patria*, 132 Fed. 972, 68 C. C. A. 397, and *The Folmina*, 153 Fed. 364, 82 C. C. A. 440. There is nothing in the opinion of the Supreme Court, in answer to the questions subsequently certified in *The Folmina*, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748, which qualifies these decisions. The *Folmina* was a peculiar case; there being a disputed question of fact as to whether the damage was caused by salt water or by fresh water. On that question this court was divided. When the facts came to be certified to the Supreme Court, the finding of the majority of this court that it was caused by sea water was included, and the Supreme Court held that an exception of "perils of the sea" will not avail a vessel

which delivers its cargo damaged by sea water without anything to indicate in any way how the sea water reached it, which was just what this court had already held in *The Patria*."

The proctors for libelant in *The Good Hope*, perhaps taking the same view of the ruling of the Supreme Court in *The Folmina* as that taken by proctors for libelant here, sought a disapproval of the comment made upon that ruling by the Court in the decision from which we have just quoted, and applied to the Supreme Court for a writ of certiorari but it was denied.

The Good Hope, 225 U. S. 713.

In *The Patria*, 132 Fed. 971 (C. C. A.) the Court said:

"It is, no doubt, the rule, as appellant contends, that, when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea', and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through the peril of the sea; but if the exception is 'damage by breakage', and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover."

In *The St. Quentin*, 162 Fed. 883 (C. C. A.) the lower Court had found in favor of the libelant but the case was reversed with instructions to dis-

miss the libel and the Court used the following language:

“The bill of lading contains an exception of ‘loss or damage * * * from * * * heat or fire on board, in hulk or craft, or on shore.’ The District Court found that the injury to the shellac was undoubtedly caused by heat, and the evidence abundantly sustains the conclusion. Therefore the burden of establishing some negligence of the carrier rested upon the libelants, because the injury having resulted from an excepted cause, the carrier was not responsible unless his own negligence was affirmatively shown. *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *The Patria*, 132 Fed. 972, 68 C. C. A. 397.”

The Baralong, 172 Fed. 220 (C. C. A.), was another case involving damage to shellac by heat. It was commenced in the same District Court a short time after *The St. Quentin*, and that case having been decided in favor of libelant, upon the authority of the decision the District Court had rendered in *The St. Quentin* case, the Circuit Court of Appeals, after referring to their reversal of *The St. Quentin* case, made the following comment:

“After careful consideration we are unable to differentiate between them in any material particular favorable to the libelant. Under both bills of lading we think that, in view of the exception of damage from heat, *the burden rested upon the libelant* to show that the carrier was negligent in stowing or ventilating the cargo or otherwise. This he failed to establish. Indeed, here the evidence goes far toward establishing freedom from negligence on the carrier’s part. It follows, therefore, that the same

principles which required this court to reverse the decision of the District Court in the case of *The St. Quentin*, 162 Fed. 883, require us to reverse its decree in the present case.”

An application for a writ of certiorari was then filed by libelant but the Supreme Court denied it.

The Baralong, 215 U. S. 600.

We have referred to, and quoted from, so many cases all to the same point that we feel it unnecessary to quote from others, but a late case which reviews many of the cases we have cited and in which the Court uses almost the same language used by the lower Court in this case is that of *The Konigin Luise*, 185 Fed. 478 (C. C. A.).

This Court in a decision by Judge Gilbert, in *The Henry B. Hyde*, 90 Fed. 115, and before the line of decisions by the Circuit Court of Appeals of the 2nd Circuit, laid down the rule which, as we have shown, was later followed in the Supreme Court in *The Good Hope*, 225 U. S. 713.

Other cases to the same point are

The Oceana, 171 Fed. 175;

The Hudson, 172 Fed. 1005.

Proctors for appellant claim that the burden of proving that the ship was seaworthy and properly stowed, as well as, that the damage arose from a peril of the sea, was upon us. We submit that a reading of the testimony shows clearly that the ship was seaworthy as well as properly stowed, and if such burden was upon us we have sustained it.

No testimony was offered by libelant to contradict that of Captain Baxter (p. 209) that the ship was in good condition at the commencement of the voyage, having just passed a special survey, and having had her decks tested by Lloyd's surveyor; that of John Owen (p. 243) that at that time she was in good condition as to tightness and staunchness; and that of the carpenter, Olsson (p. 259), who testified that he was present when her decks were tested and her seams were tried and found to be in proper condition. All of which was sufficient to establish her seaworthiness, as the test is stated in

The Babin Chevoys, 208 Fed. 966 (9th Circuit, Opinion by Judge Wolverton);

The F. and T. Lupton, 182 Fed. 144;

The Wildcroft, 201 U. S. 378.

We quote, in a later portion of our brief, part of the evidence that was introduced proving that the vessel was properly stowed, and that her cargo was damaged by sea water coming into the vessel during the storms and heavy weather through which she passed. All of it, evidence of a character to bring us within the meaning of the language quoted by counsel for appellant from *The Queen*, 78 Fed. 151, 164.

B. AS TO APPELLANT'S CONTENTION THAT THE EVIDENCE DOES NOT SHOW THAT THE DAMAGE WAS CAUSED BY PERILS OF THE SEA.

1. Before discussing this point, we desire to call the attention of the Court to the fact that all of the

testimony of appellant's witnesses was heard in open Court and only the officers of the Dolbadarn Castle examined out of the presence of the Court. There is a mass of testimony in the record to support all of the findings. As to those points upon which the testimony was conflicting, the Court, after seeing and hearing appellant's witnesses, concluded that libelant was not entitled to recover. It seems to us obvious upon reading the record, that appellant has advanced no reason why this Court should violate one of its fundamental rules,—that it will not disturb the findings of a trial Court made upon disputed questions of fact when that Court has had before it the witnesses to judge, from their appearance and manner, of their credibility and what weight should be given to their testimony. Indeed, it has been held that to warrant this Court in reversing the findings of a lower Court in such a case as this it must *clearly* appear that there was error. This rule has been followed by an unbroken line of authority in this and other circuits.

Whitney v. Olsen, 108 Fed. 292 (9th Circuit, Opinion by Judge Hawley);

Alaska Packers Ass'n v. Domenico, 117 Fed. 99 (9th Circuit, Opinion by Judge Ross);

Baker-Whiteley Coal Co. v. Neptune Nav. Co., 120 Fed. 247;

The Oscar B., 121 Fed. 978 (9th Circuit, Opinion by Judge Morrow);

Paauhau Sugar Plantation Co. v. Palapala, 127 Fed. 920 (9th Circuit, Opinion by Judge Hawley);

Coastwise Trans. Co. v. Baltimore Steam Packet Co., 148 Fed. 837;

The Phila. B. & W. R. Co. v. The Southern Trans. Co., 205 Fed. 732;

Davis v. Schwartz, 155 U. S. 631.

The proctors for appellant claim that the testimony of W. H. Stewart, that the pitting of the steel plates "was in a large measure due to salt water", contains an admission that part of the damage was not caused by salt water and that it falls short of proving that the pitting was caused by perils of the sea. This criticism would be proper were it not for the testimony in the record as to the storms through which the vessel passed and her straining and the entrance of sea water into her holds during these storms. Proctors for appellant ignore the testimony of Captain Baxter:

"We had one of the heaviest gales that ever I experienced during the 26 years (p. 210). As I said before, we had one of the worst gales that I ever experienced on this passage (p. 211). The first heavy weather lasted three days. There was a good deal of damage done. Stays carried away, sails blowed away. The bell was torn off its fastening and the forecastle head, the belfry, was smashed. The belfry was 8 feet above the main deck. There was a monstrous sea came over the bow that swept everything. It filled the decks fore and aft (p. 212). We had other heavy weather down towards Cape Horn off and on for about ten days, the effect of which was that her decks were strained and leaking in some places. I saw evidence of it underneath the deck on the cargo being discharged. I could see it had been wet at the seams. I

found that the salt water also went down in the hold at the opening about the main ventilator (p. 213). I could see traces of salt running down the tanks and on the edges of the plates which were piled up next the tanks. I could see where the water had come down and made its way over upon the plates (p. 214). The water entered through the decks during the storm. I could see the stains on the underneath part of the decks and also stains on the cement barrels (p. 227). The damage to the steel plates and to the cement came from stress of weather. The ship laboring and straining and leaking through the deck and also through water going down the main ventilator (p. 228). The water that came through the deck damaged the cement and the water that came through the ventilators damaged the steel plates (p. 230). The deck was leaking over where the coke was stored also (p. 231)."

The testimony of the mate, Owen, was also disregarded that he had been around the Horn two dozen times and on this voyage he experienced just as bad weather as he ever had; worse, if anything (p. 243); that he examined the deck of the vessel after she was discharged and found that she had been leaking and that evidences of the water having come through the seams could be seen on the wood (p. 244). This witness also testified (p. 245) that only the top row of the barrels containing the cement were damaged and that these barrels were below where the seams were shown to have leaked.

We will not quote at length the excerpts from the log which appear on pages 193 to 201, but feel that we need have offered no other evidence than that

contained in the log to prove the severity of the storms through which the vessel passed. The decks were repeatedly awash and the phrase "shipping heavy water" appears again and again.

2. APPELLANT'S CONTENTION THAT THE EVIDENCE OF LIBELANT SHOWS THAT THE CAKING OF THE CEMENT AND PITTING OF THE STEEL WERE CAUSED BY COKE SWEAT AND POOR VENTILATION.

The testimony quoted by appellant is all that of experts called to prove that the damage was caused by coke sweat and poor ventilation and this testimony is based partly upon examinations made of the plates and barrels after they had left the hold of the vessel. Appellant ignores entirely the testimony of John A. Bishop (p. 52) that when he heard that a claim was to be made against the vessel he immediately instructed Mr. Stewart to examine the iron to determine its condition and the cause of the damage and that Mr. Stewart reported that the damage was due to salt water.

W. H. Stewart testified (p. 44) that he was, and had been, Surveyor for Lloyd's Register for twelve years and that he had been called upon in 1910 to examine the steel plates in the cargo of the Dolbadarn Castle; that his examination was made by testing with nitrate of silver. That the reaction was that usually given by salt (p. 45). The test made by him was the usual and customary test applied by marine surveyors (p. 49) and that there was no question in his mind about the cause of the damage to the steel plates.

Captain Thomas A. Wallace, Marine Surveyor and Port Warden of the Port of San Francisco, who had during the previous four years examined approximately several hundred vessels (p. 61) and who remembered having examined the vessel at 8 A. M. when the hatches were taken off and again at 10 A. M. before they commenced to discharge (p. 62) testified that his examination showed that the top tiers of cement "right abaft of the main mast and out in the wings were, the iron hoops were rusted, and I got a hammer and tested the barrels, hammered them, and I told them there were a whole lot of the top tier that was caked". He then said that he made "the test immediately on the barrels and on the hoops" and they "showed salt water very plainly" (p. 63). The captain also testified that "right alongside the mast and the mast partners, around the mainmast, it showed where the water had leaked down there pretty badly".

Even Captain Pillsbury, libelant's witness, testified "there appeared to me to have been a leak in the decks or at the aft part of the hatch, or around the mainmast and some salt water got down through the decks around the mast" (p. 105). "The salt water came from the leaks through the decks and abaft the hatch and around the mainmast" (p. 106).

3. APPELLANT'S CONTENTION AS TO INHERENT PROBABILITY OF THE CORRECTNESS OF THE THEORY OF LIBELANT.

We are surprised that libelant admits that its case is based upon "theory". We submit that it is

a proper designation for the basis upon which libelant claims the right to recover. Notwithstanding the testimony, part of which we have just quoted, appellant claims under the foregoing subdivision of its brief that the damage to both cement and steel plates was spread all over. We feel that this particular portion of the brief calls for no further reply.

4. APPELLANT'S CONTENTION THAT THE FINDINGS OF THE COURT ARE INSUFFICIENT TO SUPPORT THE DECREE.

We are in doubt as to whether under this heading appellant claims that it was necessary for the lower Court to make findings upon the issues before it, or whether it is simply a broad statement that the decree entered should have been in favor of libelant and against claimant. Had the Court failed to write an opinion and had simply ordered the libel dismissed, the decree entered upon that order would have been as valid as it is now with proctors for libelant advised of why the court ordered it so dismissed.

In its opinion, the Court (p. 313) reviews the testimony and very clearly expresses why under the evidence the burden of proving improper stowage was shifted to the libelant and we would but be repeating what we have already attempted to make clear in the opening portion of this brief if we went into it fully again.

“It having been shown that the vessel encountered storms of such violence as to reasonably account for the opening of the seams

in her decks and the consequent damage to her cargo, the burden of proof is upon the libelant to establish the fact of improper stowage, contributing to the strain upon the vessel's deck and the resulting injury thereto."

The Neptune, 6 Blatchf. 193; Fed. Cas. 10,118;

The Polynesia, 30 Fed. 210;

The Fern Holme, 24 Fed. 502;

The Burswell, 13 Fed. 904;

Clark v. Barnwell, 12 How. 272;

Muddle v. Stride, 9 Carr. & Payne 380.

No claim was made by libelant that the vessel was unseaworthy in any particular other than that indirectly questioned in the stowage of the cargo and having fully expressed its views about that matter the Court simply did not think it necessary to refer otherwise to the "seaworthiness" of the vessel.

C. APPELLANT'S CONTENTION THAT CLAIMANT FAILED TO SEGREGATE LIBELANT'S PERISHABLE CARGO FROM THE COKE CARGO BY A SUFFICIENT BULKHEAD.

This claim was answered by the lower Court as follows:

"The vessel was under charter to libelant, who selected the whole cargo, including the coke, so that no negligence may be imputed to the ship from the fact itself that coke formed a part of the cargo (p. 312). * * * *The bulkheads, however, were better ones for the purpose intended, than those generally in use at*

the time, and on the whole case I am not prepared to say that the stowage was not proper.”

The owners of the Dolbadarn Castle in this case did much more than did the owners of the vessel in *Ohrloff v. Briscal*, 35 L. J. P. C. 63; where it was held not to be improper stowage to allow casks of oil to be stowed in the same hold with bales of wool and bales of rags, in ignorance that the wool and rags might become heated, and so might dry the staves of the casks and render them leaky. The Court there said:

“If the shipowners were ignorant of the consequences of taking such a cargo, we do not think it amounted to culpable negligence on their part to stow, in the only place they could be stowed, *the goods which under the charter-party the charterers had a right to insist, and did insist, should form part of the cargo. On this question it is, in our opinion, very material to consider not only that the charterers insisted, but also that the cargo was, according to the terms of the charter-party, received on board, and stowed as it was presented for shipment by them; and that they were shown to be very frequently on board, as the stowage progressed, and were well acquainted with the mode of stowage (which was effected in a masterly way), and never made any complaint or objection to it.* * * *

“Even if the appellants knew, or ought to have known, what the consequence of such a stowage must be, we are not prepared to say that they were guilty of negligence in not putting up bulkheads. Assuming that they could have been so constructed as to protect the part of the hold where the oil was stowed from the influence of the heat generated by the wool and

bags, still this could not have been done without much trouble and considerable expense, which we cannot concede that the shippers had a right to throw on the shipowners, because the shippers chose to load the ship they had chartered with a cargo of such a nature. And to this we may add that, even supposing the shipowners to have been aware of the usual consequences of stowing such a cargo in the same hold, they might have well come to the conclusion that the shippers were also aware of them, and would not have put such a cargo on board unless they had been assured that the casks were of such extraordinary strength and goodness as to be capable of resisting the usual influence of a heated temperature."

In the discussion of the testimony introduced with respect to the cargo of coke, proctors for appellant rely here, as they did in the court below, upon the case of *The Jean Bart*, 197 Fed. 1002, but in that case the Court opened its opinion with a finding that the damage to the straw coverings in her cargo was not due to sea water. The log book of *The Jean Bart* was also found to have been falsified and in addition the Court specifically found that the testimony of both officers and crew was false. There the ship was also found unseaworthy because of inadequate ventilators as well as insufficient ventilation during the voyage. Here no question has arisen in that respect.

Assuming that we have not already shown that claimant is not liable for the loss suffered by libellant, the only point left for discussion is the question of the propriety of the use of bulkheads such

as those used on the Dolbadarn Castle. Mr. John A. Bishop testified that sweat does not necessarily arise from coke (p. 55) and that although he had had a number of cases where damages had arisen from coke he had also had a number of cases of coke cargoes that "had come out in perfect condition without any damage at all"; and that in cases "where the coke was laid on steel plates, and the steel plates came out in perfectly sound condition, where the coke was actually laid on steel plates!

Mr. Bishop also testified:

"In the course of our business we have represented owners in probably 75 per cent of the cases of damaged cargoes coming to this port; a large number of those cases have been damaged due to carrying coke and general cargo. There were very serious claims in the year about 1908, 1909; so serious, that we decided to take it up with the various surveyors in the Port of San Francisco to determine whether or not coke and cement or general cargo could not be carried in the same ship without being damaged. I personally called a meeting of the various surveyors, and they recommended that bulkheads be built between coke and other general cargo. Those recommendations were forwarded by me personally to our representatives in London who issued circular notices to all ship owners in Great Britain and France, and the result of that notice was that bulkheads were put up, and this ship, I think, was one of the first ships to sail after that time, after receiving our notice and the recommendation which we had received from the surveyors in this port. Prior to that time, in a great majority of cases that came under our notice there were no bulkheads

at all between the coke and the general cargo. There were merely sails or matting dividing the coke and the general cargo.”

The significance of Mr. Bishop’s testimony can be best appreciated by reading it in the light of what the Courts have held sufficient to absolve the ship from the charge of improper stowage in cases of this character.

“ ‘Was there a want of proper skill and care in stowing the cattle?’ It is well settled that in determining what is proper stowage the customs and usages of the place of shipment are to be considered, and, if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty or negligence can be imputed to the ship, and in case of damage under great stress of weather the injuries will be ascribed to perils of the sea. *The Titania*, 19 Fed. 107.”

The Tjomo, 115 Fed. 919.

“To determine whether the duty of properly stowing a cargo has been fulfilled it is necessary only to prove the customary method of stowing and loading.”

The Dan, 40 Fed. 691;

The Keystone, 31 Fed. 412;

The Alexandria, 23 Fed. 826.

Judge Brown, in the leading case of *The Titania*, 19 Fed. 101, at page 107, states the rule as follows:

“The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or of the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the

vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners."

Even Captain Pillsbury, the expert called by libelant, and who testified that he was usually requested to examine cargoes because of their arriving in damaged condition, admitted that for a great many years Meyer, Wilson & Co., Balfour, Guthrie & Co., and other shipping houses here in San Francisco have shipped coke into this port in vessels also carrying general cargo and that in these sailing vessels the coke and general cargo were not in separate air-tight compartments (p. 107). Captain Pillsbury also, reluctantly, admitted that the salt water that leaked into the vessel would have caused sweat upon the vessel going down through the tropics and then after evaporating and being confined in the holds condensing upon going around the Horn, where it was cold (pp. 108-9).

The criticism of the testimony of H. L. E. Meyer, Jr., offered by appellant, can hardly be deemed of much importance in view of Mr. Meyer's testimony that his firm since 1881 has been receiving cargoes of coke with general cargo and during that time has handled as much as all the others together. He said (p. 163):

“We have in fact in a good many ships found that ship owners in vessels where there was not a laid between-decks had used our steel beams for making a deck and there put the coke on top of the beams without any separation whatsoever and ships have escaped in practically every instance all damage.”

One of Mr. Meyer's ships had arrived the day he was on the stand and two the day before, all having coke and steel in their cargoes, and they were stowed with ordinary wooden bulkheads (p. 164). In a word, it confirms the other testimony in the case that the bulkheads in the Dolbadarn Castle were as good as the best that had ever come into the Port of San Francisco and in connection with the testimony of Mr. Bishop proves beyond question that the vessel was stowed in a manner shown by “the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters” to have been proper. As stated by the lower Court in its opinion,

“The bulkheads, however, were better ones for the purpose intended, than those generally in use at the time.”

We respectfully submit that the decree of the District Court should be affirmed.

Dated, San Francisco,
March 1, 1915.

IRA S. LILLYCK,
Proctor for Appellee.

No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY

(a corporation),

Libelant and Appellant,

vs.

DOLBADARN CASTLE SHIPPING
COMPANY, LIMITED (a corpora-

tion) claimant of the British bark
"Dolbadarn Castle", her tackle, ap-
parel and furniture,

Claimant and Appellee.

REPLY BRIEF FOR APPELLANT

LOUIS T. HENGSTLER,

ANDROS & HENGSTLER,

Proctors for Libelant.

Filed this day of March, 1915.

MAR 15 1915

FRANK D. MONCKTON, *Clerk.*

F. D. Monckton, *Deputy Clerk.*

Clerk.

No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY

(a corporation),

Libelant and Appellant,

vs.

DOLBADARN CASTLE SHIPPING

COMPANY, LIMITED (a corpora-

tion) claimant of the British bark

“Dolbadarn Castle”, her tackle, ap-

parel and furniture,

Claimant and Appellee.

REPLY BRIEF FOR APPELLANT.

1. *The Answer Admits, Without Qualification, that the Cement Was Received by the Ship in Good Order and Condition.*
2. *Claimant's Admission in the Answer that the Steel Plates Were Shipped in Good Order and Condition.*

ALLEGATION IN LIBEL:

“That on or about the 19th day of February, 1910, at the said port of Rotterdam, John P. Best

& Co. shipped, *in good order and condition*, certain merchandise, to wit: 2023 sheets, on the said bark, then and there employed as a general ship in the transportation of cargoes from said port of Rotterdam by said bark to the port of San Francisco, and there to be delivered, in like good order and condition, unto order, or to his or their assignees."

ADMITTED IN ANSWER:

"The 2023 steel plates referred to * * * were received by claimant on board said vessel * * *, but that, when so received, the said plates, or a portion thereof, were *in a more or less rusty condition.*"

Claimant's defense was *not* damage by "rust", and, indeed, libelant does not allege nor claim that the "damaged condition" of the steel plates was due to "rust". The evidence shows that rust does not impair the quality of the plates so as to make them unmerchantable, but that it is "*the eating into the plate, forming pits or grooves*" (Ap. p. 121), which constitutes the damage. "We accepted all the plates that were not *pitted or damaged* in any way after removing the rust, scraping it off" (Ap. p. 122).

"There was evidently some corrosive agency at work there * * *" (p. 123). The chemist testified that this corrosive agency was "*carbon dioxide* in the presence of water" (p. 179). "The *coke* must have been a very potent factor in the cause of pitting" (p. 188).

The allegation of the answer that the plates "were in a more or less rusty condition" is, therefore, consistent with an admission that they were not damaged when shipped. It is safe to say that plates, after being exposed to the air, may always be described as "slightly rusty", or "more or less rusty".

3. *The Answer Admits that, on Delivery at San Francisco, the Barrels of Cement and a Portion of the Steel Plates Were not in the Same Good Order and Condition in Which They Had Been Received.*

4. *"Perils of the Sea" is the Only Defense Made in the Answer.*

Hence the facts which "should be added" to the facts admitted (as contended in the brief for appellee, pages 2-3) have no bearing whatever upon this case.

5. *"Specifications of Error" (pages 4-5 of Brief for Appellee).*

Appellant is credited with boldness in stating that the Court below committed error in throwing the burden of proof on the libelant, under the issues raised by the pleadings.

But there is really nothing heroic in assuming that libelant may find the issues upon which the case is to be tried from claimant's answer.

“It is as important that the *pleadings* in the admiralty shall show *the issue to be tried* as it is in other courts.”

The Earnwell, 68 Fed. 229.

In its simplest form the case is the following:

Libelant states: My goods were damaged while they were in your charge as carrier.

Claimant states: True, *but*: They were damaged by perils of the sea.

It follows that claimant is *not* liable if they were damaged by perils of the sea. Claimant *is* liable if they were damaged by any cause except the cause pleaded in defense. The sole issue is, therefore:

“*Did perils of the sea cake the cement and pit the steel?*”

On this issue claimant had the affirmative. We have shown in our opening brief that claimant's affirmative case was very weak. Libelant, in rebutting it, was naturally handicapped. Its representatives were not present when the goods were exposed to the risk of perils of the sea, and therefore not directly able to show what happened on the voyage. The only witnesses who were present were the representatives of claimant and, if biased at all, are biased in favor of claimant. Under the circumstances libelant showed the story which the damaged goods themselves told when they arrived in port. Their condition revealed to the men of science that the caking of the cement and the pitting

of the steel were caused by the dangerous coke cargo by which they were surrounded.

6. *Appellee's "Reply to Argument of Appellant"*.

The "Reply" *assumes* (what is not admitted) that the damages sustained in the transportation of the merchandise *were attributable to causes in the bill of lading*; it *assumes* what it was claimant's duty to plead and prove; in other words, it begs the question. It is quite true, as said in *The Koranna* (Brief for Appellee, page 7), that:

"Whenever damages which are *attributable to causes excepted* * * * are sustained, * * * the burden of proof is upon the libellant;"

but where the damages are not in fact so attributable (*a fortiori* where they are not even pleaded in defense to be so attributable), the burden lies upon the carrier, and the libellant may rely upon his presumption. Appellee seems to harbor the delusion that the mere fact that it pleads in defense an excepted peril, viz, perils of the sea, shifts the burden of proving negligence upon the libellant, whereas the law is, of course, that the *burden of establishing this defense remains throughout on the claimant*.

Of course, if it were *assumed as a fact from the beginning* that the damage in the case at bar was caused by perils of the sea, the burden would be on libellants to show negligence; but where, as here, it is *denied from the beginning* that the damage was

caused by perils of the sea, claimant must show it affirmatively.

Appellee's citation from *The Good Hope* (page 8 of Brief) is a good illustration of the true principle. The Court said:

“*Undoubtedly* the cause of the decay and loss was ‘heat’—the evidence to that effect is *undoubtedly*—and heat is an excepted cause.”

This is a different case from the one at bar, where the cause of the damage is disputed, and is, indeed, the whole dispute.

Similarly in the case of *The Patria* (cited on page 9 of Brief). The two portions of the opinion italicized in the Brief are correct statements of the law. The first portion applies “when the damage is *manifestly* of the sort excepted” (hence does not apply to the case at bar); the second portion also applies only to the case when “the article arrives broken”, and there is no dispute about it.

So also in the case of *The St. Quentin* (cited on pages 9-10 of the Brief). There the injury was “*undoubtedly*” caused by heat. In the case at bar the sole *issue in dispute* is whether the goods were injured by perils of the sea. Claimant had the burden of establishing by a preponderance of the evidence that perils of the sea were the cause of the injury. Instead of holding claimant to this burden, the lower Court imposed upon the libellant the burden of showing improper stowage.

Likewise in *The Königin Louise* (cited on page 11 of the Brief). There “the sole damage was *concededly* due to ‘leakage and breakage’, a cause which was specifically excepted. *Therefore* the ship is *prima facie* not liable” (185 Fed. 478, 481). The decision in *The Königin Louise* that “the shipper has the burden of proof to show negligence” is predicated upon this fact. But obviously we have a different case where, as at bar, the damage was *not* concededly due to a cause specifically excepted by the bill of lading. In such a case the burden of *establishing, in affirmative defense*, that the damage was due to such a cause (damage by perils of the sea) is certainly, and throughout the case, upon the ship, and it never shifts upon the shipper or consignee.

In the last paragraph of page 11, and on page 12, of its brief, appellee claims that it has sustained its burden of proving that the ship *was seaworthy and properly stowed*.

Apart from the very meagre proof as to tightness and staunchness of the ship (Captain Baxter’s evidence, p. 209, is mere hearsay), we contend that claimant did not sustain its burden of showing that the ship was made reasonably fit to carry a cargo of coke *and* perishable cargoes; that, on the contrary, the evidence shows by clear preponderance that the bulkhead which was supposed and intended to segregate the dangerous cargo from the perish-

able cargo was entirely insufficient, as we have shown in our Opening Brief, and that this unseaworthy condition of the bulkhead caused the damage.

7. *The Evidence Does not Show That the Damage Was Caused by Perils of the Sea.*

The Court finds:

“The damage complained of was the caking of cement, and the rusting and pitting of the steel plates. *This damage both to the cement and to the steel plates was occasioned by some form of moisture.*”

The Court then holds that *if* this moisture was sea water, it was caused by perils of the sea and therefore excusable; but *if* it was caused by rust or sweat, the ship was liable only if libelant could show negligence. The conclusion that “part of the damage at least was due to sea water” may apply to 1% or less, and it would follow that 99% or more of the damage was *not* caused by sea water, and that libelant is entitled to judgment for that amount. We have no quarrel with the principles of the cases cited by appellant on page 13 of its Brief.

We have shown in our Opening Brief that claimant has not only failed to show that the caking of the cement and the pitting of the steel plates were due to perils of the sea, but that libelant has shown by a decided preponderance that both were caused by coke sweat and poor ventilation. On this

point one consideration seems to us conclusive: The evidence shows, *without conflict*, that some sea water entered "around the mainmast" (as shown on page 17 of Brief for Appellee, by the testimony of Port Warden Wallace for the ship, and Captain Pillsbury for the libelant); according to the Captain's testimony, some water "went down the ventilators to damage the plates" (Ap. p. 230); the evidence also shows, *without conflict*, that the damage both to the cement and the steel plates, was not localized, but spread all over; these two facts (apart from human testimony) lead inevitably to the conclusion that the agency which caused the damage pervaded the cargo space in which the damaged goods were stowed. There is no escape from this "theory".

8. *The Bulkheads.*

On this subject appellee apparently relies upon the statement of the Court below that "the bulkheads were better ones for the purpose intended than those generally in use at the time", although the uncontradicted evidence shows that they were not air tight. The standard suggested by the Court does not satisfy the standard which claimant was bound to maintain by law.

The case of *Ohrloff v. Briscal*, cited on page 20 of the Brief for Appellee, is predicated upon the stowage of two kinds of merchandise in the same hold "in ignorance of the consequences of taking such a cargo". It can have no application to the

case at bar where the captain of the ship testified (Ap. p. 206): "There have been so much damage through not having bulkheads, and I was instructed to have a most perfect bulkhead built on each end of the general cargo." We have shown in our Opening Brief (pages 17-19) that the bulkheads were not adequate to keep the perishable cargo safe from the destructive coke, and the evidence shows clearly that it was in fact the *carbon dioxide released by the coke* which pitted the steel plates. The mere fact that the coke, from one side of the bulkhead, sent the destructive messenger to the steel on the other side is more eloquent than the testimony of witnesses as to the sufficiency of the bulkhead.

The testimony of Captain Baxter is in strange conflict with that of Mr. John A. Bishop—both witnesses interested on the side of appellee. The captain says: "With coke I know that coke is liable to sweat, and that is why I took the precaution to have the bulkheads made in such perfect manner" (p. 225). Mr. Bishop, on the other hand, uses his best efforts to convince the Court that, really, coke is a comparatively harmless cargo (p. 55). If Mr. Bishop is correct, the captain was foolish and extravagant in constructing such perfect bulkheads as he claims them to be; besides, if Mr. Bishop is correct, it is difficult to see why he should take the trouble of initiating the serious steps described by him for the purpose of protecting general cargo from coke (Brief for Appellee, p. 22). The general habits of coke (as testified to by Mr. Bishop who,

as an average adjuster, has presumably a mere hearsay acquaintance with it) become, however, irrelevant in the presence of the admission of Captain Baxter that, in the instance of this ship, the hold where the coke was stowed was in fact stained by sweat "*most decidedly*". Nothing could be more significant of the nature of this kind of cargo, and the necessity for tight bulkheads than the "aside" of Mr. Meyer, the expert called by claimant, that "I only wish they were water and air-tight sometimes" (Ap. p. 163).

Appellee's authorities to the conclusiveness of "customs and usages of the place of shipment" on the subject of good stowage would have a bearing upon this case if the question were whether matting *or* bulkheads should be used to divide coke and general cargo; but when either one is once used, in accordance with the custom, the only relevant question is whether the matting or bulkhead are adequate for the purpose.

The question of the bulkhead, or the dangerous proximity of the coke, are not, however, the fundamental questions in the case; but the fundamental error which pervades the findings and conclusions of the District Court is to require libellant to maintain the burden of proof under the pleadings and admissions of the parties. This is in conflict with the settled law which again found expression in the recent case of *The Giulia*, 218 Fed. 744, 746, in the following terms:

“It is admitted that the bales of hemp were received by the carrier in good condition and delivered in bad condition. That being so, there certainly is no question but that the carrier, in seeking to be relieved from liability for damages under the exceptions of perils from the seas, was bound to prove that the injuries were the result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence.”

It is respectfully submitted that claimant, in this case, failed to prove that the injuries to the goods were the result of perils of the sea; that the whole case shows by great preponderance of evidence not only that the cause of the injuries was not perils of the sea, but also that the cause of the injuries was unseaworthiness, improper stowage and poor ventilation. The decree of the District Court should be reversed and a decree ordered for libelant for its damages and costs.

Dated, San Francisco,
March 12, 1915.

Respectfully submitted,

LOUIS T. HENGSTLER,
ANDROS & HENGSTLER,
Proctors for Libelant.

No. 2432

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Plaintiff in Error,
VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Eastern District of Washington,
Northern Division.

Filed

JUL 21 1914

F. D. Monahan

Clerk

No. 2432

United States
Circuit Court of Appeals
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NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1483.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant.

Complaint.

Now comes the United States of America, by
Oscar Cain, United States Attorney for the Eastern
District of Washington, and brings this action on
behalf of the United States against the Northern
Pacific Railway Company, a Corporation organized
and doing business under the laws of the State of
Wisconsin, and having an office and place of busi-
ness at Cle Elum, in the State of Washington; this

*Page-number appearing at foot of page of original certified Record.

action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M. on January 10, 1912, upon its line of railroad at and between the stations of Tacoma, in the State of Washington, and [2] Cle Elum, in said State, within the jurisdiction of this court, required and permitted its certain Engineer and employee, to wit, C. W. Hoffman, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date to the hour of 11:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1507, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M. on January 10, 1912, upon its line of railroad at and between the stations of Tacoma, in the State of Washington, and Cle Elum, in said State, within the jurisdiction of this court, required and permitted its certain Fireman and employee, to wit, J. E. Rainey, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date to the hour of 11:00 o'clock P. M. on said date. [3]

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1507, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on January 10, 1912, upon its line of railroad at and between the stations of Tacoma, in the State of Washington, and Cle Elum, in said State, within the jurisdiction of this court, required and permitted its certain Conductor and employee, to wit, R. E. Walsh, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date to the hour of 10:30 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1507, said train being then and there engaged in the movement of interstate traffic. [4]

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A FOURTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on January 10, 1912, upon its line of railroad at and between the stations of Tacoma in the State of Washington, and Cle Elum, in said State, within the jurisdiction of this court, required and permitted its certain Brakeman and employee, to wit, Thomas Kilcoyne, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date, to the hour of 10:30 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1507, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A FIFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in [5] interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on January 10, 1912, upon its line of railroad at and between the stations of Tacoma, in the State of Washington, and Cle Elum, in said State, within the jurisdiction of this court, required and permitted its certain Brakeman and employee, to wit, A. T. Feilds, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date to the hour of 10:30 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1507, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SIXTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, [6] beginning at the hour of 5:00 o'clock A. M. on January 10, 1912, upon its line of railroad at and between the stations of Tacoma, in the State of Washington, and Cle Elum, in said State, within the jurisdiction of this court, required and permitted its certain Brakeman and employee, to wit, J. H. Wilson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock A. M. on said date to the hour of 10:30 o'clock, on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. Extra, drawn by its own locomotive engine No. 1507, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress, said defendant is liable to plaintiff in the sum of Five Hundred Dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of Three Thousand Dollars and its costs herein expended.

(Signed) OSCAR CAIN,
United States Attorney.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washington. October 7, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [7]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1483.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Answer.

I.

Defendant for answer to plaintiff's complaint admits the first paragraph of said complaint.

II.

Answering plaintiff's first cause of action defendant admits paragraph one thereof. Defendant denies that on the 10th day of January, 1912, or at any time, it required or permitted its engineer, C.

W. Hoffman, to be or remain on duty as such engineer for a longer period than sixteen consecutive hours or that it in any manner violated the act referred to in said complaint, and it expressly denies that defendant's said employee, C. W. Hoffman, was on said date employed for a longer period of time than sixteen consecutive hours, and save as admitted herein defendant expressly denies each and every allegation, averment, matter and thing in said first cause of action contained whether as herein stated or otherwise.

III.

Answering plaintiff's second cause of action defendant admits paragraph one thereof. Defendant denies that on the 10th day of January, 1912, or at any time, it required or permitted its fireman, J. E. Rainey, to be or remain on duty [8] as such fireman for a longer period than sixteen consecutive hours or that it in any manner violated the act referred to in said complaint, and it expressly denies that defendant's said employee, J. E. Rainey, was on said date employed for a longer period of time than sixteen consecutive hours, and save as admitted herein defendant expressly denies each and every allegation, averment, matter and thing in said second cause of action contained whether as herein stated or otherwise.

IV.

Answering plaintiff's third cause of action defendant admits paragraph one thereof. Defendant denies that on the 10th day of January, 1912, or at any time, it required or permitted its conductor, R.

E. Walsh, to be or remain on duty as such conductor for a longer period than sixteen consecutive hours or that it in any manner violated the act referred to in said complaint, and it expressly denies that defendant's said employee, R. E. Walsh, was on said date employed for a longer period of time than sixteen consecutive hours, and save as admitted herein defendant expressly denies each and every allegation, averment, matter and thing in said third cause of action contained, whether as herein stated or otherwise.

V.

Answering plaintiff's fourth cause of action defendant admits paragraph one thereof. Defendant denies that on the 10th day of January, 1912, or at any time, it required or permitted its brakeman, Thomas Kilcoyne, to be or remain on duty as such brakeman for a longer period than sixteen consecutive hours or that it in any manner violated the act referred to in said complaint, and it expressly denies that defendant's said employee, Thomas Kilcoyne, was on said date employed for a longer period of time than sixteen consecutive [9] hours, and save as admitted herein defendant expressly denies each and every allegation, averment, matter and thing in said fourth cause of action contained, whether as herein stated or otherwise.

VI.

Answering plaintiff's fifth cause of action defendant admits paragraph one thereof. Defendant denies that on the 10th day of January, 1912, or at any time, it required or permitted its brakeman, A.

T. Feilds, to be or remain on duty as such brakeman for a longer period than sixteen consecutive hours, or that it in any manner violated the act referred to in said complaint, and it expressly denies that defendant's said employee, A. T. Feilds, was on said date employed for a longer period of time than sixteen consecutive hours, and save as admitted herein defendant expressly denies each and every allegation, averment, matter and thing in said fifth cause of action contained, whether as herein stated or otherwise.

VII.

Answering plaintiff's sixth cause of action defendant admits paragraph one thereof. Defendant denies that on the 10th day of January, 1912, or at any time, it required or permitted its brakeman, J. H. Wilson, to be or remain on duty as such brakeman for a longer period than sixteen consecutive hours or that it in any manner violated the act referred to in said complaint, and it expressly denies that defendant's said employee, J. H. Wilson, was on said date employed for a longer period of time than sixteen consecutive hours, and save as admitted herein defendant expressly denies each and every allegation, averment, matter and thing in said sixth cause of action contained, whether as herein stated or otherwise.

(Signed) EDWARD J. CANNON,
Attorney for Defendant. [10]

State of Washington,
County of Spokane,—ss.

C. R. Lonergan, being first duly sworn, upon oath deposes and says: That he is General Agent of and

for the Northern Pacific Railway Company, a corporation, defendant in the above-entitled action, and has his office as such General Agent and resides in the city of Spokane, Washington; that he makes this affidavit for and on behalf of said corporation; that he has read the above and foregoing answer, knows the contents thereof and the same is true as he verily believes.

(Signed) C. R. LONERGAN.

Subscribed and sworn to before me this 31st day of January, 1913.

[Notarial Seal]

(Signed) JOHN M. CANNON,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsements]: Due service of within answer by receipt of a true copy thereof admitted this 31st day of January, 1913.

(Signed) OSCAR CAIN,
Attorney for Plaintiff.

Answer. Filed in the U. S. District Court for the Eastern District of Washington. April 14, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [11]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1483.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

**Stipulation [That Northern Pacific Railway Co. is a
Common Carrier by Railroad, etc.].**

The above numbered and entitled cause coming on for trial, it is hereby agreed and stipulated by and between the plaintiff, by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and Otis B. Kent, Special Assistant United States Attorney, and the defendant, by its attorneys, Cannon, Ferris & Swan, that the said defendant is, and was during all the times specified in the complaint, a common carrier by railroad incorporated, organized and existing and doing business under the laws of the State of Wisconsin; that it is, and was during all of said time, engaged in interstate commerce, and that those of its employees hereinafter named were, and each of them was, during their periods of service hereinafter respectfully defined, engaged in or connected with the movement of an interstate train;

That on January 10, 1912, two employees of the said defendant, to wit, C. W. Hoffman, an engineer, and J. E. Rainey, a fireman, constituting the engine

crew of defendant's engine No. 1507, hauling an extra freight train east-bound from Tacoma, in the State of Washington, to Cle Elum, in the same State, respectively went on duty as such engineer and fireman at 5:30 A. M., on said January 10, 1912; that said employees went off duty temporarily at Auburn, in the State [12] of Washington, at 8:25 A. M., and returned to duty at 10:00 A. M. on said date, at said Auburn; and that said employees thereafter remained on duty as such engineer and fireman until 11:00 P. M., on said date.

That on said January 10, 1912, four additional employees of the said defendant, to wit, R. E. Walsh, a conductor, and Thomas Kilcoyne, A. T. Feilds and J. H. Wilson, trainmen, constituting the train crew of an extra east-bound freight train hauled on said date by defendant's locomotive No. 1507 from Tacoma, in the State of Washington, to Cle Elum, in the same State, respectively went on duty as such conductor and trainmen at 5:00 A. M. on said date; that said employees went off duty temporarily at Auburn, in the said State of Washington, at 8:25 A. M. and returned to duty at said Auburn at 10:00 A. M., on said date; and that said employees thereafter remained on duty as such conductor and trainmen until 10:30 P. M., on said January 10, 1912.

(Signed) FRANCIS A. GARRECHT,

United States Attorney.

(Signed) OTIS B. KENT,

Special Assistant United States Attorney.

(Signed) E. J. CANNON,

CANNON, FERRIS & SWAN,

Attorneys for Defendant.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington. April 14, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [13]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1483.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Opinion.

FRANCIS A. GARRECHT, U. S. Atty., and
OTIS B. KENT, Spec. Asst. to U. S. Atty.
EDWARD J. CANNON, for Defendant.

RUDKIN, District Judge.

This is an action to recover penalties for violation of the Act of Congress of March 4, 1907, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" (34 Stat. 1415), commonly known as "the hours of service act." The complaint contains six complaints or causes of action in all, based upon excessive hours of service by the several members of the same train crew. The case has been submitted to the court upon an agreed statement of facts from which the following appears:

The defendant is a common carrier by railroad

engaged in interstate commerce, and the several employees named in the different counts or causes of action were in the employ of the defendant engaged in or in connection with the movement of its trains; on the 10th day of January, 1912, the engineer and fireman [14] of engine No. 1507, hauling an east-bound extra freight train from Tacoma, Washington, went on duty at the hour of five-thirty o'clock A. M. and remained on duty until eleven o'clock P. M. of the same day; the conductor and the remaining members of the crew went on duty at the hour of five o'clock A. M. and remained on duty until the hour of ten-thirty o'clock P. M.; the schedule time out of Tacoma was six o'clock A. M., but the departure of the train was delayed for forty-five minutes by reason of a derailment in the yards; the train arrived at Auburn, eighteen miles east of Tacoma, at eight twenty-five A. M. and was there held for a period of one hour and thirty minutes to permit superior trains to meet and pass; during this period of one hour and thirty minutes the train was placed in charge of an engine foreman or watchman at Auburn and the train crew laid off or released from duty. If the layoff of one hour and thirty minutes at Auburn be included in the hours of service of the crew the law has been transgressed, but if excluded the time of actual service falls within the sixteen-hour period limited by law. The sole question presented for decision is, therefore, does a definite layoff or release from duty for a period of one hour and thirty minutes, under the circumstances stated, break the continuity of the service within the mean-

ing of the law? I am of opinion that it does not. In the case of *United States vs. Chicago, Milwaukee & P. S. Railway Company*, 197 Fed. 624, I held that a layoff of from thirty to forty-five minutes for breakfast and of about one hour each for the midday and evening meals did not break the continuity of the service. I further held in the same case that an indefinite layoff of three hours while the train crew was awaiting the arrival of a helper engine at a small way station did not break the continuity of the service. [15] This decision was cited with apparent approval in the case of *Mo. K. & T. Ry. Co. vs. United States*, 231 U. S. 112. That case, it seems to me, is controlling here. The purpose of the statute is plain and it must be so construed as to promote its policy. The hours of service of railway trainmen are long at best, leaving only eight hours for rest and recreation, and if this brief period can be broken into fragments the purpose and policy of the law will be entirely frustrated. If a train crew may be laid off for an hour and a half at one point to suit the convenience or necessities of the company, it may be laid off for a like period at another and the members of the crew thus wholly deprived of any substantial period for either sleep or rest. If this crew had not been released from duty at Auburn, the members would have been compelled to remain idle until the time of departure arrived, and the release for the brief period allowed by the company permitted them to do little else. The release was of no benefit to the crew and could not subserve any substantial purpose except to obviate the penalty im-

posed by law. Perhaps it cannot be said as a matter of law in all cases whether a release from duty for a fixed period of time will or will not be sufficient to break the continuity of the service. No doubt in extreme cases the Court may declare as a matter of law that a given period is so short as not to break the continuity of the service, or that another period is so long as to break the continuity of the service, but between these two extremes there is a twilight zone where the question becomes a mixed one of law and fact. This case, however, has been submitted to the Court for decision and whatever inferences are to be drawn from the admitted facts must be drawn by the Court, and under the admitted facts I am of opinion that the plain spirit and policy of the law has been [16] violated. I therefore adjudge the defendant guilty on each count or cause of action and impose a penalty of one hundred dollars and costs for each violation.

Let judgment be entered accordingly.

[Endorsements]: Opinion. Filed in the U. S. District Court, Eastern District of Washington. April 21, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [17]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1483.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

a Corporation,

Defendant.

Judgment.

The above-entitled cause having come on for trial on the 20th day of April, 1914, plaintiff appearing by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and Otis B. Kent, Special Assistant United States Attorney, and the defendant appearing by E. J. Cannon, Esquire, its attorney, and trial by jury having been waived by the parties hereto, the case was submitted to the Court upon an agreed statement of facts, and briefs filed on behalf of the parties hereto; and the Court having listened to arguments of counsel for the respective parties and having taken the matter under advisement, and having filed its opinion finding the defendant guilty as charged in the complaint herein, it is, therefore,

ORDERED and ADJUDGED that the defendant, Northern Pacific Railway Company, be, and it is hereby, fined in the sum of Six Hundred Dollars (\$600.00), being One Hundred Dollars (\$100.00) for each cause of action set forth in the complaint; and it is further

ORDERED and ADJUDGED that the plaintiff, United States of America, do have and recover of and from the defendant, [18] Northern Pacific Railway Company, its costs and disbursements herein incurred, taxed by the clerk in the sum of \$37.15.

Done in open court this 2d day of May, 1914.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed in the U. S. District Court for the Eastern District of Washington. May 2, 1914. W. H. Hare, Clerk. [19]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1483.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

**Notice of Filing Defendant's Proposed Bill of
Exceptions.**

To the Above-named Plaintiff, and to Messrs. Francis A. Garrecht, United States District Attorney, and Otis B. Kent, Special Assistant United States Attorney:

You and each of you are hereby notified that on the 8th day of May, 1914, the above-named defendant filed in the office of the clerk of the above-entitled court its proposed bill of exceptions of said

cause, for use upon writ of error of said cause to the Circuit Court of Appeals, a copy of which proposed bill of exceptions is herewith served upon you.

(Signed) EDWARD J. CANNON,
Attorney for Defendant.

[Endorsements]: Notice of Filing Proposed Bill of Exceptions by Defendant.

Due service of within notice by receipt of a true copy thereof admitted this 8th day of May, 1914.

(Signed) F. A. GARRECHT,
Attorney for Plaintiff.

Filed in the U. S. District Court for the Eastern District of Washington. May 8, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [20]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1483.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant,

Stipulation [Waiving Trial by Jury].

IT IS HEREBY STIPULATED and AGREED by and between the parties named in the above-entitled action that the issues of fact in the above-entitled cause may be tried and determined by the Court without the intervention of a jury, and a jury

is hereby expressly waived by both parties.

This stipulation is made pursuant to section 649 of the Revised Statutes of the United States.

(Sgd.) FRANCIS A. GARRECHT,

(Sgd.) OTIS B. KENT,

Attorneys for Plaintiff.

EDWARD J. CANNON,

Attorney for Defendant.

[Endorsements]: Stipulation Waiving Trial by Jury. Filed April 15, 1914. W. H. Hare, Clerk. By F. C. Nash, Deputy. [20 $\frac{1}{2}$]

*In the District Court of the United States for the
Eastern District of Washington.*

No. 1483.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on regularly for trial in the above-entitled court on Wednesday, April 15, 1914, before Honorable Frank H. Rudkin, presiding Judge, plaintiff appearing by Francis A. Garrecht, United States District Attorney, and Otis B. Kent, Special Assistant United States Attorney, and the defendant appearing by Edward J. Cannon, whereupon the following proceedings were had.

The following stipulation signed by the parties and filed herein was presented to the Court, to wit:

“The above numbered and entitled cause coming on for trial, it is hereby agreed and stipulated by and between the plaintiff, by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and Otis B. Kent, Special Assistant United States Attorney, and the defendant, by its attorneys, Cannon, Ferris & Swan, that the said defendant is, and was during all the time specified in the complaint, a common carrier by railroad incorporated, organized, existing and doing business under the laws of the State of Wisconsin; that it is, and was during all of said time, engaged in interstate commerce, and that those of its employees hereinafter named were, and each of them was, during their periods of service hereinafter respectively defined, engaged in or connected with the movement of an interstate train;

That on January 10, 1912, two employees of the said defendant, to wit: C. W. Hoffman, an engineer, and J. E. Rainey, a fireman, constituting the engine crew of defendant's engine No. 1507, hauling an extra [21] freight train east-bound from Tacoma, in the State of Washington, to Cle Elum, in the same State, respectively went on duty as such engineer and fireman at 5:30 A. M. on said January 10, 1912; that said employees went off duty temporarily at Auburn, in the State of Washington, at 8:25 A. M., and returned to duty at 10:00 A. M., on said date, at said Auburn; and that said employees thereafter remained on duty as such engineer and fireman until

11:00 P. M., on said date;

That on said January 10, 1912, four additional employees of the said defendant, to wit, R. E. Walsh, a conductor, and Thomas Kilcoyne, A. T. Fields and J. H. Wilson, trainmen, constituting the train crew of an extra east-bound freight hauled on said date by defendant's locomotive No. 1507 from Tacoma, in the State of Washington, to Cle Elum, in the same State, respectively went on duty as such conductor and trainmen at 5:00 A. M. on said date; that said employees went off duty temporarily at Auburn, in the said State of Washington, at 8:25 A. M., and returned to duty at said Auburn at 10:00 A. M., on said date; and that said employees thereafter remained on duty as such conductor and trainmen until 10:30 P. M., on said January 10, 1912."

Whereupon the following proceedings were had:
"Wednesday, April 15, 1914, 1:30 o'clock P. M.

The proceedings were had:

Mr. CANNON.—I might say in regard to this hours of service law which we are to take up just now, I think, both of us are anxious to do what is right in the matter, and if there is any violation it is an innocent one, and we just want to prove how it came that that order was issued, and that the order was for a definite time of an hour and a half, that is all, and then if the Court would like it, I would be much pleased to submit a brief, and you do the same.

Mr. KENT.—That is all right.

Mr. CANNON.—So that we won't take your time to argue the proposition here this afternoon.

The COURT.—It is agreed that they were laid off definitely.

Mr. CANNON.—No, the agreement is not that they were laid off definitely. The agreement is that they had an hour and a half, but I think the Government doubts us a little on that, as to whether we agreed definitely to lay them off for an hour and a half and that is the point that I brought witnesses here to-day to testify to. [22]

The COURT.—Very well; have your witnesses sworn.

(Witnesses were sworn.)

Mr. KENT.—Before they are put on the stand, your Honor, this is a question the Commission is anxious to have decided. There is a doubt in my mind as to whether or not the decision in the Supreme Court in the Santa Fe case is controlling herein.

The COURT.—That would be a question of law that will come up on the testimony.

Mr. KENT.—The only point that I make is, after consultation with Mr. Garrecht, we are very strongly predisposed to concede that the layoff was for a definite period in order to have the case tested out; and the burden would be upon Mr. Cannon, I believe. Am I right in that, Mr. Cannon?

Mr. CANNON.—I think the burden in a criminal case is always on the Government.

Mr. KENT.—Yes, but in this particular case you are seeking to bring the defendant within the exception, created by the proviso, and to that extent the burden would be upon you.

The COURT.—I suppose there is a denial of the allegations of the complaint.

Mr. KENT.—No, we have stipulated fully as to

the facts; that is, that the men went on duty at a certain time, that they were released at a certain time, that they remained on duty until a certain time when they were definitely released. The only point is that if Mr. Cannon is enabled to show that this release was definite, the case would fail and we would lose the decision.

Mr. CANNON.—In other words, I would confess and avoid then?

Mr. KENT.—Yes.

Mr. CANNON.—Then, why don't you do that? The witness will testify and he has his record here, that it was a definite release for an hour and a half. Now, why not permit it to stand just that way and then you and I file our briefs and then whichever one prevails will give the other one ample time to consider whether or not the question ought to be taken to the court of appeals.

Mr. KENT.—What do you think about that, Mr. Garrecht?

Mr. GARRECHT.—That would present the question just the same, I would think. [23]

Mr. KENT.—I think so. As a matter of fact, I would like to make an oral argument on it. In other words, I believe if the testimony of these witnesses should establish to your satisfaction that the release was for a definite period, then we could get the benefit of your judgment in the matter.

Mr. CANNON.—I will stipulate that that is the fact.

The COURT.—Very well, if that stipulation is

entered into, you can just put another paragraph on your stipulation.

Mr. CANNON.—Suppose we put this stipulation in, that such release was for a definite period of an hour and a half, which period was fixed at the time the crew was released from service and the train turned over to the engine watchman.

Mr. KENT.—In order properly to conserve the rights of the Government. Of course, you understand, your Honor, that the Government does not care anything about the penalty; we are very much more concerned in the adjudication of the question than we are in the penalty; I think we can, perhaps, show that the decision of the Supreme Court in the Santa Fe case is really not controlling here, and that your decision in the Puget Sound case is not only equitable, but that you might have gone much further. If you recall in that decision you based your judgment in favor of the Government upon the fact that the interval of three hours—although it eventually was three hours—was not pre-determined to be three hours at the time the men were excused from duty. I think that we can show to your satisfaction that the Supreme Court decision is not controlling here and in fact has no application here; but, on the other hand, if agreeable to you, I will leave it to Mr. Cannon—do you really believe, Mr. Cannon, that you can prove by your witnesses, assuming the burden of proof as I believe you would have to do, that this release was for a definite period?

Mr. CANNON.—That is what my witnesses tell me, and they are here, and they are not trying to

cover anything up.

Mr. KENT.—No, we do not think that, but in your judgment will they testify to it?

The COURT.—Were they laid off by a written order?

Mr. CANNON.—I am perfectly willing to show the record just as it was.

The COURT.—Was it by a written order?

Mr. J. A. MILLER (*Trick* despatcher of the Northern Pacific).—It was an order sent by [24] telephone, but no copy made thereof. At that time we had not got so far as to preserve copies of an order releasing from duty, but we made a record upon the train sheet at the time that the order was issued.

Mr. KENT.—A notation on the train sheet?

Mr. J. A. MILLER.—Yes, sir.

Mr. KENT.—And you would state under oath now, if we should ask you, that at the time these men were relieved they were told they would be definitely relieved for one hour and thirty minutes.

Mr. J. A. MILLER.—I would. My notation on the train sheet is definite.

Mr. KENT.—Of course, you understand that would not be the best evidence, because the latter should be introduced.

The COURT.—The only evidence in existence is the best evidence now.

Mr. CANNON.—It is the only evidence; we have different plans now that I think are much better; we have a regular order blank and we check it up; we have a double check.

Mr. KENT.—Will your other witness testify to the same thing?

Mr. CANNON.—Mr. Graves was not personally there.

Mr. KENT.—Your testimony would be to that effect, that it was for a definite period?

The OTHER WITNESS.—Yes, sir.

Mr. CANNON.—Not only that, but I have the written statement of the two trainmen themselves that that is the fact.

Mr. KENT.—That they were released and at the time they went off duty they were told they need not report for duty again until one hour and thirty or thirty-five minutes?

Mr. CANNON.—Yes, sir.

Mr. KENT.—Will you show in that stipulation that the release was for the purpose of meeting a train?

Mr. CANNON.—This is the fact that we will establish: The train was ordered to leave Tacoma at six A. M., but was delayed at that point forty-five minutes waiting for engine which had been delayed between roundhouse and yard by derailment of yard cut and therefore did not reach Auburn until 8:25 A. M., and it was then seen by the dispatcher, the witness here, that train would sustain a long delay at Auburn meeting superior trains which were [25] No. 603, No. 41, No. 257, and let No. 4 pass and to take advantage of a release period, the crew was instructed, on arrival at Auburn, that they were relieved from duty for one hour and thirty minutes, so that the train could, if possible, make Ellensburg

within the allowed time.

Mr. KENT.—And you are perfectly willing to show in that stipulation at the time we concede it was for a definite period that the purpose of this was for meeting a train?

The COURT.—Why not make that letter a part of the stipulation?

Mr. CANNON.—That is why I read it. Those are the facts.

Mr. KENT.—Under those circumstances, if your Honor please, I think that that is a good way, because it will enable us to get an opinion, and the commission would like an expression of your opinion on that point.

Mr. CANNON.—I would like also to submit a written brief, and his Honor has no time now to consider our argument anyway, and I could not finish mine before two o'clock, possibly, and you submit your brief, taking such time as you see fit.

Mr. KENT.—When would it be convenient for you?

Mr. CANNON.—I can get my brief up possibly in two days.

Mr. KENT.—Would you care for oral arguments on it, your Honor?

The COURT.—I do not think so.

Mr. KENT.—Just submit it on the brief.

The COURT.—Yes.

Mr. KENT.—We will submit those briefs, then, say Friday?

The COURT.—In fact, I do not think I care for any argument. I am ready to decide it now. I

think it is controlled by the Milwaukee case.

Mr. CANNON.—I would rather give you my reasons for thinking it is not controlled by that case, and I will give you my reasons inside of two days.

The COURT.—I will give you mine within half an hour afterwards.

Mr. KENT.—We will do that, your Honor.

Mr. CANNON.—We will consider that this case may rest right here. [26]

The COURT.—I do not know what would constitute a break in the continuity, whether it presents a question of law or a question of facts. I know I stated in the Milwaukee case if the parties had been laid off definitely for a period of three hours at a place where they could rest, in my opinion it would break the continuity of the service.

Mr. CANNON.—Without question at Auburn they had ample time and opportunity to rest.

The COURT.—In the Milwaukee case there were two hours for rest. That did not break the continuity of the service.

Mr. CANNON.—I do not think they had an opportunity to rest.

The COURT.—They could do whatever they wanted to do."

Mr. CANNON.—Both parties having rested the defendant now challenges the sufficiency of the evidence to support a judgment in favor of the plaintiff, and moves the Court to dismiss the action.

The COURT.—The motion will be denied.

Mr. CANNON.—Defendant excepts and exception is allowed.

Whereupon and thereafter counsel for the respective parties submitted briefs and the Court took said case under advisement, and thereafter and on the 21st day of April, 1914, the Court filed its opinion herein in favor of the plaintiff and against the defendant for a penalty of One Hundred Dollars (\$100.00) on each of the six counts contained in plaintiff's complaint; and thereafter and on the 2d day of May, 1914, judgment was entered in accordance with said opinion for the sum of Six Hundred Dollars (\$600.00), being One Hundred Dollars (\$100.00) on each of the causes of action set forth in the complaint, and the further sum of Thirty-Seven and 15/100 Dollars (\$37.15) costs; and now in furtherance of justice and that right may be done the defendant presents the foregoing as its full Bill of Exceptions in this cause and prays the same may be settled and allowed and signed and certified by the Judge as provided by law and the practice of this Honorable Court.

(Signed) EDWARD J. CANNON,
Attorney for Defendant. [27]

*In the District Court of the United States for the
Eastern District of Washington.*

No. 1483.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Certificate and Order Allowing and Settling Bill of Exceptions.

This cause came on duly and regularly for hearing before the court on the 27th day of May, 1914, upon application of the defendant for the settling and certifying of its proposed bill of exceptions lately filed herein, and the said proposed bill of exceptions having been presented, served and filed within the time allowed by law, and the plaintiff having proposed no amendments to said bill of exceptions, and the time for serving or filing any proposed amendments to said bill of exceptions having expired,—

Now, therefore, on motion of attorneys for defendant, it is **ORDERED**, that said proposed bill of exceptions heretofore filed by the defendant in this cause, is hereby approved, allowed and settled as the true, full and correct bill of exceptions in said cause, containing in full all the evidence and proceedings taken and had upon the trial of said cause, and that the same as so settled and allowed be now and here certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, and that the bill of exceptions when so certified be filed herein by the clerk. [28]

The foregoing bill of exceptions is full, true and correct in all respects, and it is hereby approved, allowed and settled, and made a part of the record herein.

Done in open court this 27th day of May, 1914.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Service of within Proposed Bill of Exceptions by receipt of a true copy thereof admitted this 8th day of May, 1914.

(Signed) F. A. GARRECHT,
Attorney for Plaintiff.

Bill of Exceptions. Received May 8th, 1914, and filed, after being settled and allowed by the Court, May 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [29]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Assignments of Error.

Comes now the above-named defendant Northern Pacific Railway Company, and makes and files the following Assignments of Error in said cause, which said defendant will rely upon in the United States Circuit Court of Appeals for the Ninth Judicial Circuit for relief from and reversal of the judgment entered in this cause in the court below, to wit:

I.

The Court erred in holding and deciding that lay-off of one hour and thirty minutes did not break the continuity of the service.

II.

The Court erred in including in the hours of service the one hour and thirty minutes when the train crew in question were laid off and released from duty.

III.

The Court erred in holding and deciding that under the admitted facts the defendant had violated the act commonly known as the "Hours of Service Act" (34 Stat. 1415).

IV.

The Court erred in holding and deciding that [30] the defendant was guilty on each count or cause of action or either or any of them.

V.

The Court erred in imposing a penalty of One Hundred Dollars and costs for each alleged violation or for either or any of them.

VI.

The Court erred in entering judgment against the defendant for the penalty of \$100.00 on each count or cause of action and for costs, or for any other sum or amount whatsoever, for the reason that under the admitted facts it conclusively appears that the defendant is not guilty of a violation of the Act commonly known as the "Hours of Service Act" (34 Stat. 1415) upon any of the counts or causes of action or either of them set forth in plaintiff's complaint, to which entry of judgment the defendant excepted and the exception was allowed.

VII.

The Court erred in denying defendant's challenge

to the sufficiency of the evidence to support a judgment made at the close of all the testimony of the case, and in refusing to dismiss the action, for the reason that under the admitted facts it conclusively appears that the defendant is not guilty of a violation of the act commonly known as the "Hours of Service Act" (34 Stat. 1415) upon any of the counts or causes of action, or either of them set forth in plaintiff's complaint, to which ruling the defendant excepted and the exception was allowed.

The defendant duly excepted to the rulings of the Court in the matter of each of the above errors assigned, and hereby and now assigns each and every one of said rulings as error.

(Signed) EDWARD J. CANNON,
GEO. M. FERRIS,
CHAS. E. SWAN,

Attorneys for Defendant. [31]

[Endorsements]: Assignment of Errors.

Due service of within Assignment of Errors by receipt of a true copy thereof admitted this 27th day of May, 1914.

(Signed) F. A. GARRECHT,
Attorney for Plaintiff.

Filed in the United States District Court for the Eastern District of Washington, May 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.
[31½]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named defendant Northern Pacific Railway Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United States District Court for the Eastern District of Washington, Northern Division, at the April term thereof, 1914, manifest error hath happened to the great damage of this defendant.

Your petitioner further respectfully shows that it has this day filed herewith its Assignments of Error committed by the Court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, its suit in error.

WHEREFORE, the defendant prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a supersedeas in said cause; and for such other orders and

process as may cause the same [32] to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 27th day of May, 1914.

(Signed) EDWARD J. CANNON,
GEO. M. FERRIS,
CHAS. E. SWAN,
Attorneys for Defendant.

[Endorsements]: Petition for Writ of Error.

Due service of within petition by receipt of a true copy thereof admitted this 27th day of May, 1914.

(Signed) F. A. GARRECHT,
Attorney for Plaintiff.

Filed in the U. S. District Court for the Eastern District of Washington. May 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [33]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

**Order Allowing Writ of Error (and Fixing Amount
of Bond).**

The defendant Northern Pacific Railway Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment

made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having been this day duly allowed:

Now, therefore, it is ORDERED that upon the said defendant, Northern Pacific Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of One Thousand (\$1,000) Dollars, payable to the United States of America, plaintiff in the above-entitled cause to the effect that if said defendant Northern Pacific Railway Company, and plaintiff in error, shall prosecute [34] the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and effect, the said bond to be approved by the Court; that all further proceedings in this suit be, and they are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 27th day of May, 1914.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Allowing Writ of Error and Fixing Amount of Bond.

Due service of within order by receipt of a true copy thereof admitted this 27th day of May, 1914.

(Signed) F. A. GARRECHT,
Attorney for Plaintiff.

Filed in the U. S. District Court for the Eastern District of Washington, May 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [35]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Writ of Error [Original].

The President of the United States, to the Honorable Judges of the District Court of the United States, for the Eastern District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Northern Pacific Railway Company, a corporation, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened to the great damage of the said Northern

Pacific Railway Company, plaintiff in error, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City of San Francisco, in the State of California, [36] on the 26th day of June next, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 27th day of May, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal]

W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

By Frank C. Nash,

Deputy Clerk, U. S. District Court, Eastern District of Washington. [37]

[Endorsed]: No. 1483. In the U. S. District Court, District of Eastern Washington, Northern

Division. United States of America, Plaintiff, vs. Northern Pacific Railway Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. May 27, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

Due service of within Writ of Error by receipt of a true copy thereof admitted this 27th day of May, '14.

F. A. GARRECHT,
Attorney for Plaintiff.

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Northern Pacific Railway Company, a corporation, as principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Washington, as surety, are held and firmly bound unto the United States of America in the full and just sum of One Thousand (\$1000) Dol-

lars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, heirs, administrators, executors and legal representatives jointly and severally firmly by these presents.

Sealed with our seals and dated this 25th day of May, 1914.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court between the United States of America as plaintiff and the said Northern Pacific Railway Company, a corporation as [38] defendant, a judgment was rendered in favor of said plaintiff and against said defendant for the sum of Six Hundred (\$600) Dollars, and costs of action, and the said Northern Pacific Railway Company has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a Citation directed to the said above-named plaintiff, citing and admonishing it to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Northern Pacific Railway Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs, if it fails to make good its plea, then this

obligation shall be void; otherwise to remain in full force and effect.

(Signed) NORTHERN PACIFIC RAIL-
WAY COMPANY.

By EDWARD J. CANNON,
Its Attorney.

(Signed) NATIONAL SURETY COM-
PANY,

By JAMES A. BROWN,
Resident Vice-president.

[Seal] Attest: By S. A. MITCHELL,
Resident Assistant Secretary.

The above and foregoing bond approved this 27th day of May, 1914.

(Signed) FRANK H. RUDKIN,
United States District Judge. [39]

[Endorsements]: Bond on Writ of Error.

Due service of the within Bond on Writ of Error by receipt of a true copy thereof admitted this 27th day of May, 1914.

(Signed) F. A. GARRECHT,
Attorney for Plaintiff.

Filed in the U. S. District Court for the Eastern District of Washington, May 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [40]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to the United
States of America and to Francis A. Garrecht
and Otis B. Kent, Your Attorneys, Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit to be held at San Fran-
cisco, in the State of California, within thirty (30)
days from the date of this writ, pursuant to a Writ
of Error filed in the Clerk's office of the District
Court of the United States for the Eastern District
of Washington, Northern Division, wherein the
Northern Pacific Railway Company, a Corporation,
is plaintiff in error and you are defendant in error,
to show cause, if any there be, why judgment in said
Writ of Error mentioned should not be corrected
and speedy justice should not be done to the party
in that behalf.

WITNESS the Honorable EDWARD D.
WHITE, Chief Justice of the Supreme Court of

United States this 27 day of May, [41] One Thousand Nine Hundred Fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal]

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: No. 1483. In the U. S. District Court, District of Eastern Washington, Northern Division. United States of America, Plaintiff, vs. Northern Pacific Railway Company, a Corporation, Defendant. Citation (on Writ of Error). Filed in the U. S. District Court, Eastern Dist. of Washington. May 27, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

Due service of within Citation by receipt of a true copy thereof admitted this 27th day of May, 1914.

F. A. GARRECHT,
Attorney for Plaintiff. [42]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete

record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said Court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

1. Complaint.
2. Answer.
3. Stipulation.
4. Opinion.
5. Judgment.
6. Bill of Exceptions and Certificate.
7. Notice of Filing Bill of Exceptions.
8. Assignment of Errors.
9. Petition for Writ of Error.
10. Order Allowing Writ of Error and Fixing Bond.
11. Bond.
12. Citation.
13. Writ of Error.
14. Praecipe for Transcript of Record.
15. Stipulation Waiving Jury Trial.

—and any and all records, entries, pleadings, proceedings, papers, filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) EDWARD J. CANNON,
Attorney for Defendant. [43]

[Endorsements]: Praeceptum for Transcript of the Record. Filed in the U. S. District Court for the Eastern District of Washington. May 27, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [44]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing pages, numbered from No. 1 to No. 44, inclusive, constitute, and are a true and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the defendant and the plaintiff in error in its praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 27th day of May,

1914. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing, and certifying to said record amounts to the sum of \$28.60, and that the same has been paid in full by Cannon, Ferris & Swan, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of [45] Spokane, in the said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 4th day of June, 1914, and in the Independence of the United States of America, the one hundred and thirty-eighth.

[Seal]

W. H. HARE,

Clerk U. S. District Court for the Eastern District of Washington. [46]

[Endorsed]: No. 2432. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received and filed June 8, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHERN PACIFIC RAIL-
WAY COMPANY, a corpora-
tion,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

2432

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error to the United States District
Court of the Eastern District of Wash-
ington, Northern Division.*

EDWARD J. CANNON,
EMERSON HADLEY,

Attorneys for Plaintiff in Error.

Filed

SEP 1- 1914

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHERN PACIFIC RAIL-
WAY COMPANY, a corpora-
tion,

Plaintiff in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error to the United States District
Court of the Eastern District of Wash-
ington, Northern Division.*

EDWARD J. CANNON,
EMERSON HADLEY,

Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

Action was brought by the government, plaintiff below, against the Railway Company, defendant below, to recover penalties alleging violation of the Hours of Service Act of March 4, 1907 (34 Statutes 415). The charge of violation grew out of the following admitted facts:

The train crew were called to leave Tacoma in an easterly direction at 6:00 A. M. The rules of the Company require that certain of the train crew report one hour before time for the train to leave. On this occasion there was a delay of forty-five minutes on account of derailment of yard cut at starting point and the train reached the Auburn terminals, eighteen miles away, at eight o'clock and twenty-five minutes, the men having put in an hour and a half actual work. At Auburn it was discovered that Nos. 603, 41 and 257, superior trains, must be met upon the road if the train proceeded, and No. 4 must be allowed to pass, and in view of these conditions, the train crew was released at the Auburn terminals for the full definite period of one hour and a half and the train was placed in charge of an engine foreman or watchman.

Considering as time in actual service the hour before the train was scheduled to leave, and the forty-five minutes waiting because of the mishap before the train started, and the hour and a half the time the crew was laid off at Auburn, and, considering also the time spent at meals and the time necessary to report in at Cle Elum (the destination), after the train was cared for, the train crew consumed more time than sixteen hours. If we deduct the time the crew was laid off at Auburn, the sixteen-hour period was not exceeded.

Upon the admission of these facts the defendant, plaintiff in error here, challenged the sufficiency of the evidence to support a judgment in favor of the plaintiff, defendant in error here, and moved the court to dismiss the action (Transcript of Record, page 31). The motion was denied, argument was had and later judgment in the sum of \$600.00 and costs entered against plaintiff in error and this writ sued out.

ASSIGNMENTS OF ERROR.

The appellant specifies the following particulars in which it believes and avers that the court erred in rendering the judgment complained of:

I.

The court erred in holding and deciding that releasing the train crew for a definite period of one hour and thirty minutes at its Auburn terminals did not break the continuity of the service.

II.

The court erred in including in the hours of service the hour and thirty minute period during which the train crew in question was let off and released from duty.

III.

The court erred in holding and deciding that under the admitted facts the defendant (plaintiff in error here) had violated the act known as the Hours of Service Act (34 Statutes 415).

IV.

The court erred in holding and deciding that the defendant (plaintiff in error here) was guilty on each count or cause of action or either or any of them.

V.

The court erred in imposing a penalty of \$100.00

and costs for each alleged violation or for either or any of them.

VI.

The court erred in denying defendant's (plaintiff in error here) challenge to the sufficiency of the evidence to support the judgment made at the close of the case, and in refusing to dismiss the action for the reason that under the admitted facts it appears that the defendant (plaintiff in error here) was not guilty of a violation of the aforesaid act upon any of the counts or causes of action.

The defendant took timely exceptions to each of the errors complained of.

ARGUMENT.

It is admitted that the engineer and fireman went on duty at five-thirty o'clock in the morning and went off duty at eleven o'clock in the evening of the same day, that the conductor and brakeman went on duty at five o'clock in the morning and went off duty at ten-thirty in the evening.

The government has stipulated, as a *fact* in this case, that all these employes went "*off duty*" at Auburn at 8:25 A. M. and "returned to duty" at

10 A. M. (See Stipulation, pages 13 and 14, Transcript.)

The trial court, in its opinion on page sixteen of Transcript, says regarding this time from 8:25 to 10 A. M., “*during* this period of one hour and thirty minutes the train was placed in charge of an engine foreman or watchman at Auburn and the train crew *laid off or released from duty.*”

The decision of this case depends upon whether or not these employes were “on duty” between 8:25 A. M. and 10 A. M.

The statute so far as applicable to this case reads as follows:

“That it shall not be lawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or

again go on duty without having had at least eight consecutive hours off duty."

If the employees in this case were not *on duty* from 8:25 A. M. to 10 A. M., it seems to be beyond question that they were not "on duty for a longer period than sixteen consecutive hours,"—and also that they had not "been continuously on duty for sixteen hours," and it does not appear that any of them had "been on duty sixteen hours in the aggregate in any twenty-four hour period."

Were these employees "*on duty*" between 8:25 A. M. and 10 A. M.? Apparently the question is answered by the formal written stipulation signed by the two United States Attorneys in charge of this case. Their stipulation is that these men "*went off duty temporarily at Auburn, in the State of Washington, at 8:25 A. M. and returned to duty at 10:00 A. M. on said date at said Auburn.*" If they "*went off duty*" at one time and "*returned to duty*" at another, it follows they were not on duty in meantime.

But notwithstanding this stipulation, the court has held that these men were *on duty* continuously from the time they went to work in the morning until they stopped at night,—and seems to place

its decision that these men were on duty during this period from 8:25 A. M. to 10 A. M. on these grounds,—

First, that the period of sixteen hours' labor allowed by the statute cannot be broken into two or more periods of labor aggregating sixteen hours.

Second, that the period of one hour and a half for rest is so short a time, that it is no benefit to the employee, and therefore, cannot be excluded in computing the hours of service.

Third, that case is controlled by *M. K. & T. Ry. Co. vs. U. S.*, 23 U. S., 112.

Upon the first point, the court says:

“The hours of service of railway trainmen are long at best, leaving only eight hours for rest and recreation, and if this brief period can be broken into fragments, the purpose and policy of the law will be entirely frustrated.”

It would seem from this that the trial court was of the opinion that period of labor must be computed continuously from the time it commences and that the time of rest must also be a continuous period. It is possible that this might have

been a wise provision, but it is also certain that Congress, when it passed the law in question, did not consider such a requirement necessary, for the statute clearly contemplates that the sixteen hours of service in the twenty-four, may be made up of more than one period. It provides that if an employee is on duty continuously for sixteen hours, he shall not be permitted again to go on duty until he has had at least *ten consecutive* hours off duty and also provides that where the employee has been on duty *sixteen hours in the aggregate*, in any twenty-four hour period, he shall not be required or permitted to again go on duty, until he has had at least *eight* consecutive hours off duty.

The term *sixteen hours in the aggregate*, in this statute, must mean sixteen hours where the service is not continuous, but is broken into more than one period, for if *sixteen hours in the aggregate*, means the same thing as sixteen continuous hours, then this provision contradicts and nullifies the preceding clause, which provides for ten hours rest after sixteen hours continuous service. Moreover, this is a question that is no longer an open one, for the Supreme Court has already decided that the hours of service allowed under this

statute may be in two or more periods. *U. S. v. Atchison, Topeka and Santa Fe Railway*, 220 U. S., 37. The court held in this case that the nine hours of service allowed a telegraph operator was not required to be a continuous period, but could be made up of two periods of work aggregating nine hours, separated by a period of three hours rest. The court says regarding this language of the statute:

“The alternative reference in §2 to ‘sixteen consecutive hours’ and ‘sixteen hours in the aggregate’ shows that the obvious possibility of two periods of service in the same twenty-four hours was before the mind of Congress and there was no oversight in the choice of words.”

In this case the court further says in answer to a suggestion from the government, that a man might be set to work two hours on and two hours off alternatively. “This hardly is a practical suggestion.” This answers the similar suggestion made in the opinion of the trial court in this case. Congress doubtless had in mind, when this law was passed, that there was no disposition on the part of railroad companies to make the work of their employees uselessly severe. It is almost impossible to imagine any circumstances in railroad

operations, under which it would be to the advantage of either the company or the employees that the latter should work and rest for very short periods alternatively and it was not necessary that any such contingency should be provided against.

Second. The court further places its decision on the ground that an hour and a half is so short a period of rest that it should not be taken into account and, therefore, the court was at liberty to hold that the service of the employees was continuous from the time they commenced work in the morning, until they quit at night. We think this conclusion of the court is not supported by the general experience of men. An absolute rest of an hour and a half, when a man is entirely relieved from all duty and all responsibility, is generally recognized to be of great benefit to a man who is working long hours. Take for example, the engineer of a train. Suppose he has been steadily running an engine for several hours. Can anyone say that an absolute rest of an hour and a half is of no benefit, or that because the time is so short it is of no consequence? Is the ordinary nooning of a laboring man of one hour so short a time that the period of rest is no benefit to him and, therefore, of no consequence? Would

the laborer so regard it if the hour was taken away from him and he was required to work during that hour? If the hour and a half is so short that as a rest period it is inconsequential, it ought to follow that the addition of one hour and a half to the sixteen hours of labor allowed is also so short as to amount to nothing, but we apprehend no one will be found to make that claim. Take the case of a telegraph operator employed in a day and night office. This same statute provides he cannot be permitted to work more than nine hours in twenty-four. Suppose he worked from 6:00 A. M. till 12 o'clock noon, was off duty until one-thirty P. M. and then worked from one-thirty P. M. until four-thirty o'clock P. M. Would a court be justified in holding on that state of facts that the operator was on duty ten hours and a half,—that his service was continuous and in violation of the statute? The Supreme Court has said in the *Atchison* case that if such an operator worked from six-thirty A. M. to twelve and from three P. M. to six-thirty P. M., there was no violation of the statute. What is there in the statute that permits the court to say that in computing the hours of service under the statute a rest of three hours at noon

can be excluded and a rest of an hour and a half cannot?

But it may be claimed that there is a distinction to be drawn between the case of a telegraph operator who only works nine hours and that of a trainman who may work sixteen. If any such distinction is drawn, where would the telegraph operator in a day station come? He is permitted to work thirteen hours. Suppose he goes on duty at 5:30 A. M. and stays on duty till 12 o'clock noon,—is off duty from 12 o'clock noon until 1 o'clock P. M. and then is on duty from 1 P. M. to 7:30 P. M. Has he been on duty thirteen hours or fourteen hours? Would the court hold that he was on duty continuously from 5:30 A. M. until 7:30 P. M.,—that the hour's rest at noon was of such trifling importance that it should be disregarded in computing the hours of service? Would the operator say, if he had a contract allowing him an hour off duty at noon, that the hour off at noon was of no consequence and no benefit, or would he say that it was a great relief to him to be entirely without responsibility for an hour each day? There is no half-way ground if a rest of an hour or an hour and a half is of enough consequence to be taken into

consideration, in computing the hours of service, in the case of a telegraph operator. Then it is also of enough consequence to be taken into account in the case of trainmen. Indeed a rest of an hour and a half is of more importance to the trainman, for the reason that they may be required to work a longer time on a stretch and therefore need the rest more than the man whose hours are shorter.

Third. Is the decision of this case controlled by the decision of the Supreme Court in *M. K. & T. Co. vs. U. S.* 231, U. S. 112? The opinion of Mr. Justice Holmes in that case in so far as it relates to this matter is as follows:

“One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624, 628; *United States v. Denver & R. G. R. Co.*, 197 Fed. Rep. 629.”

The ground on which the time this crew was waiting for their engine was held to be a part of their time *on duty*, was that they were *under orders liable to be called upon at any moment and were not at liberty to go away*. This was not the condition of the employees in the present case. They were *not* under orders. They were *not* liable to be called at any moment, but on the contrary, they had been released for a definite period of one hour and a half. They *were* at liberty to go away if they wished. They were at a terminal of the Railway Company and could have gone off and slept, or used the time in any way they wished. The natural inference to be drawn from this decision of the Supreme Court is that the employees in this case were not on duty during the hour and a half they were released at Auburn,—for all of the conditions which the court points to a showing that the men, in that case, were on duty are exactly reversed in this case.

The trial court seems to be of the opinion that because the Supreme Court cited the opinion of the District Court in *U. S. v. C., M. & P. S. Ry.*, 197 Fed. 624, therefore it signified its approval of every proposition decided in that case. We think that this is giving too broad a significance

to the citation in question. The citation of the case doubtless does signify the approval of the case so far as it relates to the proposition of law under which it was cited. The court cited this case as sustaining its ruling that an employee that was under orders liable to be called upon to work at any moment and who was not at liberty to leave his train was *on* duty. We do not think that it can fairly be said that the court thereby approved a ruling that an employee absolutely released from all duty and responsibility for an hour was still *on* duty. That was a question the court did not have under consideration.

The trial court further suggests that while in extreme cases the court may declare, as a matter of law, that a given period is so short as not to break the continuity of the service, or that another period is so long as to break the continuity of the service, that between these two extremes there is a "twilight zone where the question becomes a mixed one of law and fact," and that since in this case a jury had been waived, therefore the court was justified in finding as a fact that the employees in this case were not *off duty* for the hour and a half during which they were released at Auburn. As has been said before the

government has stipulated as a fact, in this case, that these men went *off duty* at 8:25 A. M. and returned to duty at 10 A. M.

We do not see how in the face of this stipulation even a jury would be allowed to find that they did not go off duty, but were on duty all the time. The reason the court gives is that the time was so short that the rest was of no benefit to the employees. While it is possible that insignificant periods of rest might be disregarded in computing hours of service, we submit for the reasons already stated an hour and a half is such a substantial rest that a jury would not be allowed to find that a man who had an absolute rest for that time had been working all the time and any verdict based upon such a finding would be set aside.

It may throw some light upon the subject to consider how the ruling of the court in this case, will work out in actual practice. Most of the divisions of railroads are about one hundred miles long. A fast freight train will make the run over the division in about six to eight hours. It is not uncommon for a train crew to double back the same day; that is, take a train over the divi-

sion and then after a short interval go back to the starting point. It is, of course, important to the Company and the crew to know how long a time they can be on the road going back without exceeding the sixteen hours permitted by statute.

We understand it is conceded that if for example, a crew starts in the morning and consumes eight hours in getting to the end of the division and then after an interval of three hours starts back, they can run full eight hours before they are compelled to tie up and rest, to avoid violating the hours of service law, but if they start back on the return trip, after staying at the terminal only an hour and a half, according to the decision of the trial court, no one can tell when the sixteen hours service will expire. It may expire in six and a half hours after they start back and it may not expire until eight hours after they start back, because there is no way to tell whether the crew were on duty the hour and a half they laid over at the terminal except to submit the question to a jury and, of course, one jury might decide one way and another the other way on the same evidence, and the Company might incur penalties amounting to two or three thousand dollars.

It may be answered that the Railway Company can be on the safe side by stopping the crew when they have been out six hours and a half. But how would it be if the lay-over had been two or two and a half hours? It is still a question of fact for a jury to say whether the men were *on duty* when they were laying off. In such a case are we still within the limits of that "twilight zone," where it is so dark that only a jury can tell what is legal and what is illegal. If this is the law, it is certainly unfortunate that a penal statute apparently quite plain on its face should be rendered so uncertain by judicial interpretation.

We submit that the principles of law applicable to this case have been decided by the Supreme Court in the cases of *U. S. vs. Atchison, Topeka & Santa Fe Ry., supra*, and *Missouri, Kansas & Texas Ry. vs. U. S., supra*, and that the judgment of the lower court should be reversed.

EDWARD J. CANNON,

EMERSON HADLEY,

Attorneys for Plaintiff in Error.

**United States Circuit Court of Appeals for
the Ninth Circuit**

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF
IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

FRANCIS A. GARRECHT,

United States Attorney.

PHILIP J. DOHERTY,

Special Assistant United States Attorney.

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F. D. Monckton,
Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,	}
Plaintiff in Error,	
<i>v.</i>	
THE UNITED STATES OF AMERICA,	
Defendant in Error.	}

*UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.*

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case was tried by the court under a written stipulation waiving a jury (record, p. 21), and is an action for debt in six counts for penalties for violation of the hours-of-service law (34 Stat., 1415), alleging the requirement by the railroad mentioned of excessive hours of service by six members of a train crew.

The answer was, in effect, a general denial, the only admission being that as to all counts of the

declaration the defendant was a common carrier engaged in interstate commerce by railroad.

As to each of the six employees in question the Government alleged and claimed that, on January 10, 1912, they were employed in service in specified capacities as members of a train crew from 5 o'clock a. m., until 10.30 o'clock p. m., upon its line of railroad on a certain extra train, which on said date ran from Tacoma to Cle Elum.

The railroad contends that in this case there is no violation of law because said train employees went off duty temporarily at Auburn, from 8.25 a. m. until 10 a. m., while said train was in the course of said trip from Tacoma to Cle Elum.

The circumstances as to the delay at Auburn are set forth (record, p. 29) as follows:

The train was ordered to leave Tacoma at 6 a. m., but was delayed at that point 45 minutes waiting for an engine which had been delayed between roundhouse and yard by derailment of yard cut, and therefore did not reach Auburn until 8.25 a. m., and it was then seen by the dispatcher, the witness here, that the train would sustain a long delay at Auburn, meeting superior trains, which were No. 603, No. 41, No. 257, and let No. 4 pass, and to take advantage of a release period the crew was instructed on arrival at Auburn that they were released from duty for 1 hour and 30 minutes, so that the train could, if possible, make Ellensburg within the allowed time.

The Government claims that its case is complete in the stipulation just recited and the formal stipulation. (Record, p. 13.)

The district court ruled that a temporary release, such as is disclosed in the record, did not effectually break the continuity of service, and that the time of the delay at Auburn ought not to be deducted.

The defendant, when both parties had rested, challenged the sufficiency of the evidence and moved the court to dismiss the action. This motion was denied and the defendant duly excepted.

There was judgment for the Government on each of the six counts.

Cases relied on by the Government:

United States v. Chicago, Milwaukee & Puget Sound Railway Co., 197 Fed., 624.

United States v. Chicago, Milwaukee & Puget Sound Railway Co., 195 Fed., 783.

Missouri, K. & T. Ry. Co. v. United States, 231 U. S., 112.

United States v. Denver & R. G. R. Co., 197 Fed., 629.

United States v. Kansas City So. Ry. Co., 189 Fed., 471.

QUESTION INVOLVED.

In this case and in the cross appeals in Southern Pacific case (from Arizona) now pending in this court there arises the very important question as to the effect of temporary releases of a train crew en route, and whether or not such releases may permit

the retention of a train crew in service for more than 16 hours to bring the train to its terminal.

Or, in other words, when it is foreseen that a train will take more than 16 hours to reach its terminal, may a railroad, by a temporary release of the train crew for a period of time sufficient to reduce the time of active performance of duty to 16 hours, extend the time of service of such train crew for a period equal to the time covered by such release, although the full time occupied by the train between terminals is more than 16 hours?

ARGUMENT.

Freight trains ordinarily have many delays between terminals. These delays arise from a variety of causes. Unless they arise from causes set forth in the proviso in section 3 of the act the time of the service of the crew includes the time of all such delays. By a merely formal release of the crew at any or all points where such delays occur the full time taken within which service is required can not be extended to more than 16 hours without violation of the spirit and purpose of the act.

By such releases *en route* of an hour or two at one place, and the same length of time at others, the whole purpose of the act would be nullified. As was said by Judge Rudkin in *United States v. Chicago, Milwaukee & Puget Sound Railway Company* (197 Fed., 624) :

The facts in this case demonstrate the absurdity of the company's claim. According

to its view of the law, it may work its employees for the full period of 16 hours; allow them 2 hours and 45 minutes off for their meals; lay them off for 3 hours at a siding in the mountains to wait for a helper; and thus leave them 2 hours and 15 minutes for sleep and recreation. Such a policy would illy protect the safety of either the employees or the traveling public.

As to a train crew attached to a train in the course of its journey between terminals, it is our contention that there can not be such a severance of the relation of the crew to the train as will prevent the application of the hours-of-service statute to such train crew for the whole time occupied by the trip.

The court may take judicial notice of the manner in which train and railroad operations are ordinarily conducted. As to the conductor and the engineer of an ordinary freight train *en route*, are they not during stops as well as during actual movement at all times responsible for train and engine?

And as to the rest of the train crew, their relations to the train under the facts disclosed in the stipulations in this case are such that they are at all times required to respond to a "call" for duty or a summons made by the engine's whistle, if any occasion arises which makes their actual service necessary during the interim of the so-called release. During such interim they still remain the designated train crew for that particular train.

Conductors and engineers are at all times responsible for the safety of their trains while such trains are en route.

The fires on the locomotive must be maintained during such a stop as the record discloses.

The train crew is responsible that brakes are set and maintained. If the delay is at a point where the train is not on a siding with the switch locked a flagman must protect the train at all times.

The record here does not disclose that these duties were discharged by any other persons than the train crew.

The facts show that in this case the release was made for the purpose of evading the law. It was made in an attempt to require service for a length of time not permitted by law. (Record, p. 29, at foot of page.)

* * * that they were relieved from duty for 1 hour and 30 minutes *so that* the train could, if possible, make Ellensburg *within the required time.*

If such releases are given the effect by the courts which the railroad here claims, the hours-of-service law will be so weak, ineffective, and impotent that none of the purposes of Congress in its enactment will be effectuated.

The reasons applicable in case of an office or fixed station used by telegraphers regularly closed twice a day for three hours at a time, to which regular schedule operators may with some regularity fix

their habitual rest and recreation, as in the Atchison, Topeka & Santa Fe case (220 U. S., 37), have no possible application to train crews in the course of a journey between terminals who are released at irregular intervals and for periods of varying lengths of time as delays occur to the train from various causes.

Until finally and wholly released from all attendance upon that particular train, a train crew to whom there remains unperformed a duty to take the train to which they are attached to some terminal is on duty within the meaning of the hours-of-service act.

Until their attachment to a particular train in the course of its journey is entirely canceled, the members of a train crew are on duty within the meaning of the hours-of-service law.

By no other construction may the purpose and object of the law be attained.

During the time of the delay at Auburn the employees in question, although they may not have been called upon to perform any laborious service, were nevertheless on duty within the meaning of this act, because, during all this time they were required to wait at Auburn, to be ready to proceed with the train from that place at 10 o'clock. "They were none the less on duty when inactive." (*M. K. & T. Ry. Co. v. U. S.*, 231; *U. S.*, 112, p. 119.) Their whole time of attendance, work, and duty was prolonged by this nominal release until it made up a

maximum of 17 hours and 30 minutes. In the case of *Missouri, Kansas & Texas Railway Co. v. United States*, just cited, the court said:

But it may be observed, as was said by the Government, that as toward the public every overworked man presents a distinct danger. * * *

There is no express limitation of the operation of the act to a specific duty or any class of duties; the limitation is rather to a class of employees, namely, those "actually engaged in, or connected with, the movement" of trains. The act must, therefore, be construed as being remedial in its nature, and it must receive such construction as will give to its general purpose reasonable effect.

Chairman Knapp, now circuit judge, in formulating the decision of the Interstate Commerce Commission, March 2, 1908 (13 I. C. C. Report, 140, p. 142), said:

The 16-hour provision which applies to all employees connected with the movement of trains, required no substantial change from previous practices because in most cases and under normal conditions of operation the hours of continuous duty were not in excess of 16. True, there were frequent instances of longer and clearly excessive hours of service, but the great bulk of the work of men handling trains in the usual course of business was performed *within the limits* of this provision. The evident object of the limitation was to reach the *exceptional cases*,

where longer hours presumably resulted in such fatigue as to impair bodily and mental vigor and thereby produce a preventable cause of accident.

The train crew in this case were on duty within the meaning of the act, 17 hours and 30 minutes.

United States v. C., M. & P. S. R. Co., 195 Fed. Rep., 625.

United States v. Denver & R. G. R. Co., 197 Fed. Rep., 629.

United States v. C., M. & P. S. R. Co., 195 Fed. Rep., 783.

United States v. Kan. City Ry. Co., 189 Fed. Rep., 954.

United States v. Ill. Cent. Ry. Co., 180 Fed. Rep., 630.

The real cause of the delay to this train was "meeting trains," which cause has been held not a sufficient excuse for the detention of employees on duty for more than 16 hours.

United States v. Kansas City Southern Ry. Co., 189 Fed., 471; 202 Fed., 828.

United States v. Denver & Rio Grande Railroad Co., 197 Fed., 629.

It is to be noted that the record in this case discloses that this was an "extra" train, that there was delay in getting an engine for it at its initial terminal, and that before this extra was finally made up to leave Tacoma its conflict with other trains, which caused the delay at Auburn (to cover which the release was issued) could have been foreseen. As this extra was about to start the pro-

vision for its schedule, so that it should not conflict with other trains and not hold its crew on duty more than 16 hours, was one of the ordinary and usual incidents of railroad operation.

If the usual causes of delay incident to operation were to excuse, *then the statute would be wholly ineffective to accomplish its purpose.* (*United States v. Southern Pacific Co.* (8th C. C. A.), 209 Fed., 562.)

It seems to follow logically that if delays naturally incident to normal operation do not excuse excess service of train employees, that a mere release issued to a train crew to cover the time of such a delay would not excuse, and for the same reason given by the eighth circuit, just cited, that if so construed "the statute would be wholly ineffective to accomplish its purpose."

Such a nominal release is in practical effect only a prolongation of the time of duty. It ought not to be deducted from the statutory period, because in reality it is an extension of the period within which duty is required. It is not a relief, but it is an added burden, because the hour of final relief from duty is thereby postponed.

CONTINUITY OF SERVICE.

In the court below and in some other decisions there has been admitted difficulty in the determination of what will break the continuity of service.

Decisions make clear that mere inactivity or cessation from active work does not break the con-

tinuity of service. (*Missouri, K. & T. Ry. Co.*, 231 U. S., 112, at 119.) If mere temporary inactivity does not break the continuity of service, why should a mere *order* for temporary inactivity break the continuity?

Releases for short periods also have been held not to break continuity.

We are not contesting the conclusion reached in these decisions.

But may there not be a clearer test than that adopted?

We submit that any temporary period of cessation from work or activity while a train is en route to its objective point is not to be deducted under the hours-of-service law if the train crew continues until their train reaches its destination, unless they are meanwhile permanently relieved from any further service on that trip.

To leave open as a question of fact, or as a mixed question of law and fact, the determination of what length of time will constitute a sufficient basis for a release which will break the continuity of service, leaves no definite, certain, and workable standard by which a train dispatcher may know when crews have reached the statutory limit of service.

As a practical matter of railroad operation the standard fixed by the law ought to be, and is, a fixed standard.

The rule which conforms to the intent of the law and effectuates its purpose and which will relieve

from all uncertainty in its application is this: A train crew, whether actually engaged in work or not, is within the meaning of the hours-of-service act always on duty until its train arrives at its destination or the crew is permanently relieved from any further work or responsibility for work upon that particular trip.

THE PURPOSE AND INTENT OF CONGRESS.

This court in the recent case of *Northern Pacific Railway Company v. United States* (213 Fed., 577), expressed this conclusion:

That the intent of the act was, and is, to compel rest for each member of the train's crew at the termination of the 16-hour period *to the end that his next and succeeding hours of service may be efficient.*

The Eighth Circuit Court of Appeals in *United States v. Kansas City Southern Railway Company* (202 Fed., 828), said:

This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected. (*United States v. Kansas City Southern Ry. Co. of Texas* (D. C.), 189 Fed.,

954.) The recovery is by a civil action, and the rules governing civil procedure apply. (*St. Louis Southwestern Ry. Co. v. United States* (C. C. A.), 183 Fed., 770.)

The Fourth Circuit Court of Appeals in *United States v. Atlantic Coast Line Railroad Co.* (211 Fed., 897), said:

This is not a criminal statute and therefore is not governed by the rule of strict construction. (*Johnson v. Southern Pacific Co.*, 196 U. S., 17; *St. Louis Southwestern Ry. Co. v. United States*, 183 Fed., 771.) It is rather a remedial statute which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. (*Stewart v. Bloom*, 11 Wall., 493; *Bechtel v. United States*, 101 U. S., 597.) Obviously, that purpose was to promote the safety of employees and the traveling public by prohibiting hours of service which presumably result in impaired efficiency for discharging their important duties. The end to be attained by the law is a guide to its interpretation.

The Eight Circuit Court of Appeals, *San Pedro, Los Angeles & Salt Lake Railroad Co. v. United States* (213 Fed., 326), is to the same effect.

CONCLUSION.

It is respectfully submitted that the rule which is applicable to this case is that, while a train is on its way its train crew is on duty until the final terminal

is reached, and that temporary releases of such crew while in the course of a journey do not operate to release a carrier if the full time of the journey for which the crew is engaged exceeds 16 hours.

In any event, however, a release of the length of time, and for the purpose shown under the circumstances disclosed in this record, does not relieve the carrier.

Respectfully submitted.

FRANCIS A. GARRECHT,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.



United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
ASH SHEEP COMPANY, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Montana.

Filed

AUG 28 1914

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
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for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and for
the District of Montana.*

IN EQUITY—No. 11.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 11th day of
August, 1913, complainant filed its bill of complaint
herein, being in the words and figures following, to
wit: [1*]

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

*Page number appearing at foot of page of original certified Record.

Bill of Complaint.

To the Judge of the District Court of the United States, District of Montana:

The United States of America, by James W. Freeman, United States Attorney for the District of Montana, under authority and by the direction of the Attorney General, brings this bill of complaint against the Ash Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and by reason thereof a citizen and resident of said State and District of Montana; and thereupon shows unto your Honor:

1. That the said defendant, the Ash Sheep Company, at all the times hereinafter mentioned, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and selling of sheep and other livestock in the State and District of Montana, and carrying on and conducting all such business and operations as are necessarily incident to the buying and selling of sheep in the State and District of Montana.

2. That on or about the 12th day of August, 1868, this complainant and the Crow tribe of Indians entered into, concluded and then and there was promulgated a treaty by which the United States of America set aside for the use and benefit of the [2] said Crow tribe of Indians that certain reservation within the State and District of Montana, which has

since been and now is known as the Crow Indian Reservation.

3. That during all of the times hereinafter mentioned this complainant was and now is the owner and lawfully entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation and a part thereof, in the State and District of Montana, and described as follows: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana principal meridian. That all of said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana.

4. That the lands hereinabove described are a part of the vacant ceded Indian lands of the said Crow tribe of Indians and that the Indian title to the same has not been extinguished and that said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior of the United States concerning Indian lands that have been opened for settlement and entry, dated November 27, 1911, and the Act of Congress of the United States approved April 27th, 1904 (33 Statutes at Large, page 352), entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation in Montana, and making appropriation to carry the same into effect.

5. That on or about the 14th day of July, 1913, the exact date thereof being now unknown to complainant and for that reason [3] not more definitely alleged, and ever since said date, this defendant, the Ash Sheep Company, in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid, grazed and caused to be grazed upon the tracts of land hereinabove described, and other vacant ceded Indian lands reserved for the use and benefit of said Indians, and subject to the rules and regulations and Act of Congress hereinabove referred to, a more particular description of said lands is now to complainant unknown, a large number of sheep, to wit, about seven thousand one hundred (7,100) head; that the said sheep are being grazed, and are now trespassing in and upon the respective tracts of land hereinabove described; that the defendant company, acting by and through its agents, servants and employees, has not obtained authority or any permit whatsoever to graze and cause to be grazed said sheep in and upon the land hereinabove specifically described, as provided by the rules and regulations of the Department of the Interior of the United States, or any other officials of the complainant thereunto duly authorized.

6. And complainant further avers that grazing permits have been duly and regularly issued by its duly authorized agents to certain persons authorizing and permitting said persons to graze their stock, to wit, horses and cattle, upon all of the lands hereinabove described; that said persons to whom permits

have been issued have complied with all the rules and regulations made and promulgated by the Secretary of the Interior in that regard and have paid all fees required thereunder.

7. Complainant further avers that the said defendant, the Ash Sheep Company, acting through its officers, agents, servants and employees, are now grazing and will continue to graze said seven thousand one hundred head of sheep in and upon the lands hereinabove referred to unless restrained by this court; that [4] such action on the part of the said defendant company and its agents, servants and employees constitutes a continuing trespass and will materially injure and destroy the use and value of said lands and cause irreparable damage to this complainant, and deprive the Crow Indians of the benefits thereof; and that unless restrained by this Honorable Court the defendant, in defiance of the express mandate of the law so enacted by the Congress of the United States, will continue to graze said seven thousand one hundred head of sheep without due and lawful authority therefor first had and obtained, and said defendant now claims to have the right to so maintain said sheep in and upon said lands so held by the United States of America for the use and benefit of the Crow Indian nation, and will thereby prevent and prohibit the United States from asserting any right whatsoever in said lands.

8. That the said defendant, the Ash Sheep Company, in all of its operations hereinbefore described, has been and will act through divers of its officers, agents and employees; that the names of said officers,

agents, servants and employees are to this complainant unknown and for that reason they are not made parties to this cause in their own individual names. Complainant avers, however, that unless such officers, agents, servants and employees of the said defendant are likewise restrained by an order of this Court, they will continue to trespass upon said lands, as aforesaid, and this complainant will, when the names of said officers, agents, servants and employees shall be ascertained, ask this Honorable Court permission to enjoin said officers, agents, servants and employees as party defendants in this cause. That in consequence of the said acts of defendant company, complainant and the said Crow Indians herein have been and are being deprived of the benefit of said lands and premises, and complainant alleges that by reason thereof [5] the said Crow Indians and this complainant as hereinbefore set forth have sustained damages in the sum of seven thousand one hundred dollars (\$7,100).

All of which actions, doings and pretenses of the said defendant and its said officers, agents, servants and employees are contrary to equity and good conscience and tend to the manifest injury and oppression of complainant in the premises.

WHEREFORE, forasmuch as complainant is remediless in the premises according to the strict rule of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that said defendant, the Ash Sheep Company, may full, true, direct and perfect

answer make to all and singular the matters and things hereinbefore stated and charged, but not on oath (its answer on oath being hereby expressly waived), as fully and particularly as if the same were here repeated and it thereunto distinctly interrogated; that the said defendant, the Ash Sheep Company and its officers, agents, servants and employees, during the progress of this cause and thereafter finally and perpetually may be enjoined from so grazing said seven thousand one hundred head of sheep on and upon said lands so described, and from occupying, using and trespassing on and upon said lands without having first obtained due and proper permission or authority from the Secretary of the Interior of the United States of America, and that the said defendant, its officers, and agents, be enjoined from employing or contracting with any individual, individuals, corporation or corporations not connected with or in the employ of said defendant from continuing the trespass hereinabove complained of, and from entering upon or going on the said lands, and that the said complainant may have and recover from said defendant the sum of seven thousand one hundred dollars (\$7,100) damages; and [6] that the said complainant may have such other and further relief in the premises as may be considered just in this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto this complainant a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court directed to the said defendant, the Ash

Sheep Company, thereby commanding it at a certain time and under a certain penalty therein to be limited to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem fit and meet and agreeable to equity.

JAMES W. FREEMAN,
United States Attorney,
District of Montana. [7]

United States of America,
District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JAMES W. FREEMAN.

Subscribed and sworn to before me this 11th day of August, A. D. 1913.

[Seal]

GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed Aug. 11, 1913. Geo. W. Sproule, Clerk. [8]

Thereafter, on August 11, 1913, a subpoena in equity was duly issued herein, being in the words and figures following, to wit: [9]

Subpoena.

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Montana.*

IN EQUITY.

The President of the United States of America,
Greeting: To Ash Sheep Company, a Corpora-
tion, Defendant.

You are hereby commanded, that you be and ap-
pear in said District Court of the United States
aforesaid, at the courtroom in Federal Building,
Helena, Montana, on the 1st day of September, 1913,
to answer a Bill of Complaint exhibited against you
in said court by The United States of America, Com-
plainant, and to do and receive what the said Court
shall have considered in that behalf. And this you
are not to omit, under the penalty of Five Thousand
Dollars.

WITNESS, the Honorable GEO. M. BOUR-
QUIN, Judge of the District Court of the United
States for the District of Montana, this 11th day of
August, in the year of our Lord one thousand nine
hundred and thirteen and of our Independence the
138.

[Seal]

GEO. W. SPROULE,

Clerk.

By _____,

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required, to file your answer or other defense in the clerk's office of said court on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*.

[Seal]

GEO. W. SPROULE,
Clerk.By _____,
Deputy Clerk.JAS. W. FREEMAN,
U. S. Atty.,
Solicitor for Complainant,
Helena, Montana. [10]United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 11th day of August, 1913, and personally served the same on the 12th day of August, 1913, by delivering to, and leaving with Ash Sheep Company, a corporation, by Christ Yegen, President of said corporation, said defendant named therein personally at Billings, in the County of Yellowstone, in said district, a copy thereof with him, together with a true copy of affidavit of J. W. Freeman, U. S. Attorney, motion for preliminary injunction, motion for restraining order and bill of complaint in said cause.

Helena, August 12th, 1913.

WILLIAM LINDSAY,
U. S. Marshal.
By Charles Morgan,
Deputy.

[Endorsed]: No. 11. U. S. District Court, District of Montana. In Equity. United States vs. Ash Sheep Co. Subpoena. Filed Aug. 20th, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [11]

Thereafter, on Aug. 25, 1913, Answer was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY,

Defendant.

Answer.

Now comes the defendant and for answer to complainant's bill of complaint:

I.

Admits the allegations of paragraphs one and two.

II.

Admits the allegations of paragraph three, except that it denies that the lands referred to in said paragraph are reserve lands, and denies that the said lands are set aside by the United States for the use and benefit of the Crow Indians. In that connection, it alleges that the lands in question were ceded to the United States by the said tribe, and that said lands are a portion of the public domain of the United States; the said tribe having no claim thereto, except

that the proceeds from the disposition of said lands, to the extent provided for in the treaty and act of Congress providing for their cession shall be turned over to said tribe.

III.

Answering the allegations of paragraph four, admits that the lands referred to in said paragraph were part of the said Indian [12] lands, but denies that the Indian title has not been extinguished, and denies that the said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior, in so far as the rules and regulations referred to provide that permits to said lands shall be granted for rentals provided, and the rentals so provided turned over to the Crow Indians. In that connection defendant alleges that said lands are public lands of the United States and that the Indian title to same has been extinguished.

IV.

Answering the allegations of paragraph five, admits that sheep belonging to defendant, to the number specified in the bill of complaint, graze on the tracts of land described, but denies that the lands upon which they graze were reserved for the use and benefit of the Indians, and denies that the use of said lands is subject to the rules and regulations of the Indian Department, and denies that so grazing any trespass was committed.

Admits, however, that no permit to graze said sheep on said land, pursuant to the rules and regulations of the Interior Department was obtained. In that connection, however, defendant alleges that the

lands in question were public lands of the United States, and that pursuant to the policy of the Government of the United States, as to the free use of public lands for grazing and pasturage purposes, defendant a citizen of the United States, owning the sheep in question, asserted its right under that privilege and policy, and grazed its sheep on said lands.

V.

Answering the allegations of paragraph six, defendant has no knowledge or information sufficient to form a belief. [13]

VI.

Answering the allegations of paragraph seven, admits that it is grazing its sheep, and will continue so to do on said land, unless restrained from doing so.

Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands.

Denies that its grazing said sheep in the manner herein set forth is in violation of the law, and admits that it claims to have the right to graze said sheep upon the said lands.

Denies that its grazing its sheep on said lands is in violation of any right of ownership in the United States of America, and, in that connection, avers that its grazing its sheep on said lands is in accordance with the express wish and policy of the Government of the United States, as to the use of public lands, including the land in question.

VII.

Answering the allegations of paragraph eight, admits that it will continue to use said land for graz-

ing purposes, unless restrained from so doing, and admits that its officers and agents, in the handling of said sheep will likewise do so, unless restrained.

Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.

Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant. [14]

Further replying to said paragraph, denies that complainant is without remedy at law, and denies that relief is obtainable only in equity.

Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoinder of causes of action.

Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made pursuant to the provisions of Section 2117 of the

Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity.

WHEREFORE, having answered complainant's bill of complaint, defendant prays that complainant's bill be dismissed, and that it be awarded its costs in this behalf expended.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

Due personal service of within Answer made and admitted and copy received this 25th day of August, 1913.

J. W. FREEMAN,
Solicitor for Complainant.

[Indorsed]: Title of Court and Cause. Answer.
Filed Aug. 25, 1913. Geo. W. Sproule, Clerk. [15]

That on the 19th day of August, 1913, the Memorandum Decision of the Court was duly filed herein, being in the words and figures following, to wit:
[16]

[Opinion.]

United States District Court, Montana.

UNITED STATES

vs.

ASH SHEEP CO.

Herein, the order to show cause is vacated (and thereby the temporary restraining order is discharged).

Aug. 19, 1913.

BOURQUIN, J.

MEMO.

The Court will later extend its reasons. Briefly, they are that the Departments have no authority in the matter of public lands save to the extent conferred by Congress; that the Indian title to the lands involved, which was one of only occupancy and use, has been extinguished, the trust declared by the statute being but to the proceeds of sale of said lands; that Congress incorporated the lands in the general mass of public lands, directing they be opened to settlement and sale; that this confers no authority to lease or grant exclusive grazing privileges; that to lease or grant such exclusive privileges is counter to the implied license to general grazing, the policy of the Government for more than 100 years; that to set aside this policy and establish a new policy of exclusive lease or permit will not be implied where not necessary, and to accomplish it requires congressional sanction; that until said lands are settled upon or sold, they are open to general grazing, and exclusive permits to graze said lands are without authority and legal sanction, and are void. [17]

United States District Court, District of Montana.

UNITED STATES

vs.

ASH SHEEP COMPANY.

By agreement, ratified by Congress, the Crow Indians ceded a part of their reservation in Montana to the United States. The granting clause is that "The said Indians....do hereby cede, grant and relinquish to the United States all right, title and interest which they may have to the lands" therein described. The agreement provided for a definite and unconditional money consideration. This latter was modified in the ratifying Act, to the effect that in consideration of the cession, the United States agreed to dispose of said lands at not less than \$4.00 per acre and pay the proceeds to said Indians. The Act further provided that all said lands were subject to withdrawal and disposition under the Reclamation Act so far as feasible, and those not so withdrawn "shall be disposed of under the homestead, townsite and mineral-land laws....and shall be opened to settlement and entry by proclamation of the President"; that when in the judgment of the President no more of said lands "can be disposed of at said price....he may....sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned"; that the United States was not bound to

purchase any said land or to dispose thereof except as in the Act provided, or to guarantee to find purchasers, "it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received."

Act April 27, 1904.

Said lands were opened to general settlement and entry by the President's proclamation of May 24, 1906. Much thereof has been disposed of, some by sale by virtue of the aforesaid power given [18] the President, and upon the remaining land and for the benefit of the Indians aforesaid the Bureau of Indian Affairs with the sanction of the Secretary of the Interior assumes to grant exclusive grazing privileges for a price.

Regulations have been prescribed by them providing that with the written consent of the superintendent of the reservation the licensee may fence and otherwise improve the lands; that the license may be revoked in the discretion of the Secretary of the Interior and is revoked *pro tanto* by any *bona fide* settlement upon sale or entry of any said lands, with proportionate refund of the consideration paid by the licensee; that upon expiration of the license all improvements placed upon the lands shall remain thereon and become the property of the equitable owner of the land; and that said superintendent must prevent trespasses upon said lands and prosecute trespassers.

This is a suit to enjoin defendant from trespassing

and grazing upon said lands without a permit and upon which permits have issued to others.

An order to show cause issued and a temporary restraining order accompanied it. It now appears that on May 14, 1913, a permit as aforesaid issued to a cattle company to graze a maximum number of cattle upon all such unsold and unentered lands in about eighteen townships and estimated to be 204,000 acres, for one year and renewable for four years, the consideration being \$15,300 yearly, the Secretary of the Interior reserving the right to issue to residents on or adjacent to said lands permits to also graze a limited number of cattle thereon during the same time and at the same rate, "provided that such permittees pay a proportionate share of the actual cost of water development and provided that permittees of this permit have not their full amount of cattle on the range, the consideration of any such permits to be deducted from the consideration mentioned in this permit."

The contention for complainant is that the lands involved are yet so far Indian lands, that the Indians are entitled to the use and benefit thereof until the lands are finally sold, and that in the meantime to the Indians use and benefit the Interior Department has authority to issue exclusive grazing permits as aforesaid for a consideration.

The defendant maintains that such permits would impede settlement [19] and sale of the lands and are contrary to the intent of Congress.

The Court is of the opinion that the Interior Department has not the power claimed. The Indians'

“right, title and interest” in the lands involved were at the time of the aforesaid agreement, of occupancy and use only, the fee being in the United States. They relinquished all thereof to the United States and the latter accepted the same. The purpose was to effectuate the policy of breaking up tribal relations, of settling the Indians upon separate tracts of individual ownership in fee, and of disposing of surplus lands to others for a consideration for the benefit of the Indians and ultimately to the benefit of the community and nation.

By this the Indian title to the lands was extinguished and thereafter they were no longer Indian country. The lands were to be disposed of under the general public land laws in the main, and not to revert to the Indians under any circumstances. Thereupon the lands were or became wholly territory and property of the United States, full dominion over which is by the Constitution vested in Congress, to be disposed of as the latter willed. By the Act aforesaid, Congress incorporated the lands in the general mass of public lands, subject to all the incidents of the latter, and to be likewise disposed of as aforesaid. In so far as said Act creates a trust, it would seem that it is merely precautionary, not intended to enlarge the Indians’ right, title or interest in the lands nor to create a reversion therein, but attaching to only the proceeds of sales of the lands.

The President and the Interior Department are the instruments to execute the will of Congress in the disposition of public lands. They have no authority

and power therein save that derived from some act of Congress.

The Act here involved confers upon them authority and power to sell the lands, but neither expressly nor by implication does it empower them to prescribe grazing regulations in respect to said lands and to issue exclusive licenses thereon for a consideration or at all. Even if a trust attaches to the lands, a trust to sell gives no power to lease. It can be nothing but a qualified trust, the lands approximating public lands in general and with all the incidents of the latter, including the hereinafter mentioned implied license of common grazing. And any trust herein is to the Government as trustee, not to the Interior Department. The policy of the Government from its foundation has been to permit free and unrestrained grazing of the public lands. It impliedly [20] licenses all comers to enjoy this privilege. The benefits of this policy are many and compensatory. It promotes settlement and disposition of the public lands. It aids the settler, to whom the Government's policy has always been liberal, to establish himself. It increases and cheapens the country's supply of meats. See *Buford vs. Houtz*, 133 U. S. 326. The Act involved indicates no purpose to reverse this policy or to revoke this license, and it will not be implied. In fact, Congress has steadily refused to authorize leases of the public lands, though on occasion, by express enactment, has authorized the Interior Department to lease certain Indian lands. Furthermore, the aforesaid regulations and licenses of the Interior Department tend to impede settlement

and sale of the lands and thus to defeat the intent of Congress.

True, the lands subject to the license are still open to settlement and sale, but the average settler would hesitate to invade the domain or enclosure of a corporation or other licensee. He would fear, with or without reason. And settling therein he would place himself where all grazing privileges were denied him. Other reasons are obvious. It is believed that the Interior Department in the matter of the aforesaid grazing permits is without the sanction of Congress.

Upon the whole, the Court is persuaded that the defendant is not a trespasser upon the lands involved and that it can lawfully enter upon and graze thereon. It follows that the order to show cause should be and is vacated.

August 19, 1913.

GEO. M. BOURQUIN,
Judge.

Filed Aug. 19, 1913. Geo. W. Sproule, Clerk.
[21]

Thereafter, on December 16th, 1913, order for decree was filed and entered herein, being in the words and figures following, to wit:

[Order Directing Entry of Decree.]

United States District Court, Montana.

UNITED STATES

vs.

ASH SHEEP CO.

Herein, for reasons set out in its order denying a preliminary injunction, the Court holds complainant has no cause of action and a decree will be entered for defendant, dismissing the suit.

Dec. 16th, 1913.

BOURQUIN, J.

Filed and entered Dec. 16th, 1913. Geo. W. Sproule, Clerk. [22]

Thereafter, on December 26, 1913, a Decree was duly filed and entered herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree.

This cause came on for final hearing before the Court on the 17th day of December, 1913, upon the bill of complaint and the answer, and was argued by counsel, and thereupon, upon consideration thereof, in accordance with the reasons set out by the court in its decision filed herein on August 19, 1913, vacating the order to show cause and discharging the temporary restraining order previously issued, wherein it was held by the Court that the Indian title to the lands involved in this controversy, to wit:

“Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana Principal Meridian.”

has been extinguished, and that Congress has incorporated the said land in the general mass of public lands, to be opened to settlement and sale, and that exclusive permits to graze said land are void, and without legal authority and legal sanction, it is

ORDERED, ADJUDGED and DECREED as follows, viz.:

That complainant's bill of complaint herein be, and the same hereby is, dismissed.

Dated December 26, 1913.

GEO. M. BOURQUIN,

Judge.

[Indorsed]: Title of Court and Cause. Decree. Filed and Entered December 26, 1913. Geo. W. Sproule, Clerk. [23]

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this court.

Witness my hand and the seal of said court at Helena, Montana, this 26th day of December, A. D. 1913.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk.

[Indorsed]: Title of Court and Cause. Final Record. Filed and Entered December 26, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.
[24]

Thereafter, on May 20, 1914, Petition for Appeal and Order Allowing same were duly filed and entered herein, in the words and figures following, to wit:
[25]

[Petition for and Order Allowing Appeal.]

*In the District Court of the United States, District
of Montana.*

IN EQUITY—No. 11.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

APPEAL AND ALLOWANCE.

The above-named complainant, the United States, conceiving itself to be aggrieved by the decree made and entered herein on the 26th day of December, A. D. 1913, in the above-entitled proceedings, does hereby appeal from said decree to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that its appeal be allowed and that a citation issue as provided by law, and that a transcript of the records, proceedings and papers upon which said decree was based,

duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, sitting at the city of San Francisco, in the State and Northern District of California.

BURTON K. WHEELER,
Solicitor for Complainant.

The foregoing petition is hereby granted and an appeal is allowed.

Dated this 20 day of May, 1914.

GEO. M. BOURQUIN,
Judge.

Filed and entered May 20, 1914. Geo. W. Sproule,
Clerk. [26]

Thereafter, on May 20, 1914, an Assignment of Errors was duly filed herein, in the words and figures following, to wit: [27]

*In the District Court of the United States, District
of Montana.*

IN EQUITY—No. 11.

UNITED STATES OF AMERICA,
Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant.

Assignment of Errors.

And now, on this 20th day of May, A. D. 1914, came complainant, United States of America, by its solicitor, Burton K. Wheeler, United States Attorney for the district of Montana, and says that the decree

made and entered in the above cause on the 26th day of December, A. D. 1913, is erroneous and unjust to said complainant:

FIRST: Because the Court erred in finding that the Indian title to the lands described in the said decree and involved in the above-entitled action had been extinguished.

SECOND: Because the Court erred in finding that Congress had incorporated the said lands in the general mass of public lands to be opened to settlement and sale, in pursuance to the general land laws of the United States of America, by persons qualified to settle upon or purchase said lands.

THIRD: Because the Court erred in finding that exclusive permits to graze said lands are void and without authority and legal sanction.

FOURTH: Because the Court erred in finding that the Commission of Indian Affairs had no authority to exercise control over said lands and issue grazing permits for the use of the same. [28]

FIFTH: Because the Court erred in refusing to find that said lands are lands in which the Crow tribe of Indians are interested and entitled to the use and benefit thereof until such lands are finally sold or disposed of in pursuance with the agreement of said Crow tribe of Indians as modified by the Act of Congress of April 27, 1904, ratifying the said agreement, by which said Crow tribe of Indians agreed to sell said lands to said complainant, and complainant agreed to sell and dispose of the same for said Crow tribe of Indians.

SIXTH: Because said Court erred in refusing to

find that said lands were held by the United States of America in trust for the use and benefit of said Crow tribe of Indians.

SEVENTH: Because the Court erred in holding that complainant's bill of complaint herein states no cause for relief in equity.

EIGHTH: Because the Court erred in holding that, under the pleadings herein, complainant was entitled to no relief in equity as prayed for in the bill of complaint.

NINTH: Because the Court erred in entering a decree dismissing complainant's bill of complaint.

WHEREFORE complainant prays that said decree be reversed and said District Court be directed to enter a decree herein as is prayed for in its bill of complaint.

Dated May 20th, 1914.

BURTON K. WHEELER,
United States Attorney for the District of Montana,
Solicitor for Complainant.

Filed May 20, 1914. Geo. W. Sproule, Clerk.
[29]

Thereafter, on May 20, 1914, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit:

[30]

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Citation on Appeal [Original].

United States of America to the Above-named Defendant, Ash Sheep Company, and to C. B. Nolan and William Scallon, Its Solicitors:

You are hereby notified that in a certain cause in equity in the District Court of the United States, in and for the District of Montana, wherein the United States of America is complainant and the said Ash Sheep Company, a corporation, is defendant, an appeal has been allowed the complainant therein to the Circuit Court of Appeal of the United States, in and for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at the city of San Francisco, in the northern district of California, within said Ninth Circuit, thirty days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States, in and for the District of Montana, this 20th day of May, A. D. 1914.

GEO. M. BOURQUIN,
Judge of the District Court of the United States, in
and for the District of Montana. [31]

Service of the within citation on appeal and receipt of a copy thereof this 27th day of May, 1914, is hereby admitted and acknowledged, also copies of appeal and allowance and assignment of errors.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

[Endorsed]: No. 11. United States District Court, District of Montana. United States of America, Complainant, vs. Ash Sheep Company, a Corporation, Defendant. Citation on Appeal. Filed May 29, 1914. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. [32]

Thereafter, on June 8, 1914, a Praecipe for Transcript was duly filed herein, in the words and figures following, to wit: [33]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.

ASH SHEEP COMPANY, a Corporation,
Defendant and Respondent.

Praeipie [for Transcript of Record].

To Messrs. C. B. Nolan and William Scallon, Solicitors for the Defendant and Respondent Above Named, and George W. Sproule, Clerk of Said Court:

You, and each of you, will please take notice, that the undersigned, the solicitor for the plaintiff and appellant above named, hereby serves upon you and each of you this praecipe, in conformity with the rules of court, to indicate to you the portions of the records and files in the above-entitled cause in said court which said complainant and appellant desires to and will incorporate in its transcript on the appeal herein heretofore, to wit, on the 20th day of May, 1914, taken from the judgment and decree heretofore entered in the above-entitled court to the Circuit Court of the United States in and for the Ninth Circuit, and the clerk of said court will incorporate and include in said transcript on appeal the following papers:

1. The judgment-roll or final record in said cause, consisting of the bill of complaint, subpoena, answer, decree, and certificate of clerk;
2. The memorandum decision of the Court and complete decision of the Court rendered and filed herein on the 19th day of August, 1913;
3. Order of Court made and entered in said cause on the 16th day of December, 1913, ordering a decree in favor of said defendant and dismissing complainant's bill of complaint;

4. Appeal taken and allowed herein on the 20th day [34] of May, 1914;

5. Assignment of errors filed with said appeal on the said 20th day of May, 1914;

6. Citation on appeal together with acknowledgment of service thereof by the solicitors for said defendant and respondent.

7. This praecipe for the papers and files to be included in said transcript on appeal.

BURTON K. WHEELER,
United States Attorney for the District of Montana,
Solicitor for Complainant.

Service of the foregoing praecipe and receipt of a copy thereof this 6th day of June, 1914, is hereby admitted and acknowledged.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant and Respondent.

Filed June 8, 1914. Geo. W. Sproule, Clerk.
[35]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 36 pages, numbered consecutively from 1 to 36, inclusive, is a true and correct transcript of the pleadings,

process, orders and decree and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Six 15/100 Dollars (\$6.15) and have been made a charge against appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 9th day of June, A. D. 1914.

[Seal]

GEO. W. SPROULE,
Clerk. [36]

[Endorsed]: No. 2434. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ash Sheep Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received and filed June 15, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk. . .

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,	}
Appellant,	
<i>VS.</i>	
ASH SHEEP COMPANY, a Corporation,	}
Appellee.	

APPELLANT'S BRIEF.

BURTON K. WHEELER,
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IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,	}
Appellant,	
<i>vs.</i>	
ASH SHEEP COMPANY, a Corporation,	}
Appellee.	

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The present is an appeal from a decree entered by the District Court of the United States in and for the District of Montana on the 26th day of December, 1913, in favor of the appellee herein and against appellant.

The suit is one brought by appellant to enjoin an alleged trespass by appellee on certain lands, alleged to be a part of the Crow Indian Reservation in the State and District of Montana. The allega-

tions of the complaint may be briefly summarized as follows:

After the formal allegations of the authorization of the suit by the Attorney General and the corporate capacity, business and residence of appellee, it was alleged that in 1868 appellant and the Crow Tribe of Indians entered into a treaty by which appellant set aside, for the use and benefit of said Indians, the Crow Indian Reservation (Tr. pp. 2-3); that appellant was and is the owner of and entitled to the possession of the lands particularly described in the complaint, and said lands were within the original boundaries of said Reservation and a part of the lands set aside by appellant and reserved for the use and benefit of said Indians (Tr. p. 3); that said described lands are a part of the vacant ceded lands of said tribe; that the Indian title has not been extinguished; and said lands are subject to the rules and regulations, made and promulgated by the Secretary of the Interior of the United States, concerning Indian lands that have been opened for settlement and entry, dated November 27th, 1911, and the Act of Congress of the United States, approved April 27, 1904 (33 Stat. at Large 352) (Tr. p. 3);

That appellee, in violation of the rules and regulations of the Secretary of the Interior and said Act of Congress, grazed and caused to be grazed upon the tracts of land, described in the complaint, and other vacant ceded lands of said Reservation, about 7100 head of sheep, without any

authority or permit to graze the same as provided by the rules and regulations of the Secretary of the Interior, or any other official of appellant (Tr. p. 4) ;

That grazing permits for said lands had been duly and regularly issued by appellant to certain persons, and that said persons had complied with said rules and regulations of the Secretary of the Interior and paid all fees required (Tr. pp. 4-5) ;

That appellee without any permit or authority was grazing and would continue to graze its sheep upon said lands unless restrained, and claimed to have the right so to do, and by such grazing would prevent and prohibit appellant from asserting any right whatsoever in and to said lands; that such acts constituted a continuing trespass and would materially injure the use and value of said lands and cause irreparable injury and damage to appellant and deprive said Indians of the use and benefit of said lands (Tr. p. 5) ; that in consequence of said acts of appellee, and the continuance of them, appellant and said Indians are being deprived of the use and benefit of said lands and premises and have been damaged in the sum of \$7100.00 (Tr. p. 6).

To this complaint, appellee filed its answer by which it denied that said lands are set aside by appellant for the use and benefit of said Indians and alleged that said lands are a portion of the public domain; that said Indians have no claim thereto, except that the proceeds from the disposition of said lands, as provided in said treaty shall be turned

over to said Tribe of Crow Indians (Tr. pp. 11-12); appellee further denied that the Indian title to said lands had not been extinguished and denied that said lands were subject to said rules and regulations of the Secretary of the Interior, and alleged that said lands were public lands of the United States and the Indian title thereto wholly extinguished (Tr. p. 12);

Appellee admitted that its sheep had grazed upon said lands but denied that said lands were reserved for the use and benefit of said Indians and that the use thereof is subject to the rules and regulations of the Secretary of the Interior and denied that in so grazing said lands any trespass was committed (Tr. p. 12); appellee admitted that such grazing was without any permit but alleged that it had a right to graze said lands by reason of the fact that the same were a part of the public lands of the United States (Tr. pp. 12-13). Said answer also denied on information and belief, that any grazing permits for said lands had been issued to others who had paid for the same and complied with the rules and regulations of the Secretary of the Interior (Tr. p. 13); appellee admitted that it would continue to graze said sheep on said lands unless restrained from so doing; denied that such grazing constituted a trespass or would injure or at all destroy the value of said lands; denied that such grazing was a violation of law or any right of appellant and admitted that it claimed the right to so graze said sheep and averred that such grazing

was in accordance with the public policy of appellant as to its public lands (Tr. p. 13). Appellee further alleged that there was a misjoinder of actions in the bill of complaint. (Tr. p. 14).

Upon the hearing of an order to show cause, issued at the time the suit was commenced, the court denied the application for a preliminary injunction and vacated a temporary restraining order theretofore issued against appellee, at the same time handing down a lengthy decision (Tr. pp. 16-22), and thereafter, on December 16th, 1913, the matter coming on for hearing, the court, for the reasons set forth in its said decision denying a preliminary injunction, dismissed the suit (Tr. p. 23); and thereafter on December 26th, 1913, the decree herein appealed from was entered (Tr. pp. 23-24) and this appeal was perfected on the 20th day of May, 1914 (Tr. pp. 25-30).

SPECIFICATIONS OF ERROR RELIED ON.

FIRST: Because the Court erred in finding that the Indian title to the lands described in the said decree and involved in the above-entitled action had been extinguished.

SECOND: Because the Court erred in finding that Congress had incorporated the said lands in the general mass of public lands to be opened to settlement and sale, in pursuance to the general land laws of the United States of America, by persons qualified to settle upon or purchase said lands.

THIRD: Because the Court erred in finding that exclusive permits to graze said lands are void and without authority and legal sanction.

FOURTH: Because the Court erred in finding that the Commission of Indian Affairs had no authority to exercise control over said lands and issue grazing permits for the use of the same.

FIFTH: Because the Court erred in refusing to find that said lands are lands in which the Crow tribe of Indians are interested and entitled to the use and benefit thereof until such lands are finally sold or disposed of in pursuance with the agreement of said Crow tribe of Indians as modified by the Act of Congress of April 27, 1904, ratifying the said agreement, by which said Crow tribe of Indians agreed to sell said lands to said complainant, and complainant agreed to sell and dispose of the same for said Crow tribe of Indians.

SIXTH: Because said Court erred in refusing to find that said lands were held by the United States of America in trust for the use and benefit of said Crow tribe of Indians.

SEVENTH: Because the Court erred in holding that complainant's bill of complaint herein states no cause for relief in equity.

EIGHTH: Because the Court erred in holding that, under the pleadings herein, complainant was entitled to no relief in equity as prayed for in the bill of complaint.

NINTH: Because the Court erred in entering a decree dismissing complainant's bill of complaint.

ARGUMENT.

The contentions of appellant, as shown by the foregoing specifications of error, may be most conveniently subdivided and considered under the following heads: The Indian Title and Interest in the Lands, covered by Specifications First, Second, Fifth and Sixth; The Authority of the Secretary to Issue Grazing Permits, covered by Specifications Third and Fourth; and the Decree, covered by Specifications Seventh, Eighth and Ninth.

THE INDIAN TITLE AND INTEREST IN LANDS.

It is admitted by the pleadings that the lands described in the complaint were a part of the lands embraced within the original boundaries of the Crow Indian Reservation. The most important matter for consideration here is whether by the Act of Congress approved April 27, 1904 (33 Stat. at Large 352), amending and ratifying an agreement with the Crow Indians, the Indians parted with all their rights and interests in the lands and accepted in payment for such conveyance a mere promise that the United State would at some time, when possible to so do, sell the lands and apply the proceeds to the credit of the Indians as therein specified, so that said lands thereby became public lands of the United States.

The Act itself, in so far as the matter under consideration is concerned, provides:

“That said agreement be, and the same is hereby, modified and amended to read as follows:

“Article I. That the said Indians of the Crow Reservation do hereby cede, grant and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following described lines: (Description follows) * * *

“Article II. That in consideration of the land ceded, granted, relinquished and conveyed by article one of this agreement the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the Reclamation Act approved June seventeenth, nineteen hundred and two, the homestead, townsite, and mineral land laws, except sections sixteen and thirty six, or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions of section 5, the United States to pay for sections sixteen and thirty six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for the said sections sixteen and thirty six, or an equivalent of two sections in each township, as follows:
* * *

“Art. VII. The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement are hereby continued in force and

effect, and all provisions thereof inconsistent herewith are hereby repealed. * * *

Sec. 3. * * * there is hereby appropriated out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, or so much thereof as may be necessary, for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands.

* * *

Sec. 8. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land as herein provided, or to guarantee to find purchasers for said lands or any portion thereof, it being the *intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.* (Italics ours.)

33 Statutes at Large 352.

To determine whether or not the Indians have, by said agreement, completely extinguished all their right, title and interest in and to said lands, the rule laid down by the Supreme Court of the United States in the case of *Worcester v. Georgia*, 31 U. S. (6 Pet.) 582, is the one governing us in the inter-

pretation of the Act of April 27, 1904, *supra*. In said case Chief Justice Marshall said:

“The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.”

See also:

The Kansas Indians, 5 Wall. 737, 760;

Choctow Nation v. U. S., 119 U. S. 1,-28.

In the case of Chickasaw Nation v. U. S., 32 Ct. Cl. 222, 228, it was said:

“The courts in all controversies between the Government and the Indian tribes have adopted a theory of interpretation favorable to the tribes; and while the rules of law applicable to such controversies are not so strict as those governing differences between guardian and ward, they go to this extent, as has been held, that doubts are to be resolved in favor of the Indians, that they are not to be prejudiced by mere technical construction, and that words of doubtful import are to be taken most strongly against the United States.”

The Act of Congress approved April 27, 1904,

supra, is one that was passed ratifying and amending an agreement which the Crow Indians had entered into, in the month of August, 1899, with the United States. In construing said Act and applying the rule of construction, applicable to Indian treaties, to the said agreement and Act now under consideration, it should be remembered that Congress did not ratify said agreement as it was signed and agreed to by the Indians, but undertook to and did amend said agreement in several particulars, and the amendments with which we are concerned are the following:

In the original agreement the Indians agreed to “cede, grant and relinquish to the United States all right, title and interest which they may have to the lands embraced within and bounded by the following described lines (describing them); and for such cession and grant the Indians agreed to receive a specified consideration, which is recited in said agreement as follows:

“Article II. That in consideration of the land ceded, granted and relinquished as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said Reservation eleven hundred and fifty thousand dollars, in the following manner,” (Specifying manner of expenditures).

See Original Agreement in 33 Stat. at L. 352.

But this Article of the original agreement was stricken out and Article II in Section 1 of said Act

inserted by Congress. A most careful examination of this original agreement, as signed by the United States and said Crow Indians, fails to disclose any mention of the manner in which the United States was to dispose of said lands, or any reservation or restriction upon said cession and grant to the United States, except that any Indians then allotted or residing upon any portion of the ceded tract could retain such allotments or place of residence, if they so desired, but said agreement does disclose the fact that the Indians for and in consideration of eleven hundred and fifty thousand dollars, to be paid them, intended to and did agree to make an absolute cession and grant of said lands to the United States, relinquished and giving up all rights and claims they had in or to said lands which they had enjoyed under the original treaty dated July 25, 1868, (15 St. at L. 629).

When this agreement of August, 1899, came up before Congress for ratification and acceptance, Congress refused to purchase said lands outright, as the Indians desired it to do, but so amended said agreement that the United States was only "to act as trustee for said Indians to dispose of said lands," for stipulated prices and in particular manners and to pay over to and expend the proceeds of said sales for the benefit of said Indians, only as the lands were disposed of and after reimbursement for the expenses connected with the survey and sale of said lands.

By comparing the original agreement and the

agreement as amended and then ratified and accepted it is clear that Congress did not intend that the United States should become the purchaser of said lands but intended the United States to act as a trustee for the sale of said lands, as the medium through which sales might be made. In other words by the agreement, as amended, Congress intended to create an express trust, the United States being the trustee and the Tribe of Crow Indians the *cestui qui trust*.

When the Indians entered into the Agreement of August 1899, they expressly stipulated that "should any article in the agreement fail of confirmation by Congress, then the whole shall be null and void." Of course by accepting the amendments made by Congress through acquiescence in such amendments the Indians have ratified the Act of April 27, 1904, *supra*, but inasmuch as they were not present and took no part in any discussion leading up to the enactment of said Act amending the agreement the rule of construction of Indian treaties, heretofore cited, should apply with greater strictness and any ambiguity in said Act caused by Congress inserting the amendments it did, should be resolved in favor of the Indians. These amendments absolved the United States from any liability by reason of a failure to dispose of the lands, expressly stipulating that it was not to be obligated to purchase any of the lands ceded except sections 16 and 36, or their equivalent, and even granted the United States, when any lands remained undisposed of

after a certain period and the President saw fit so to do, the power to dispose of such remaining lands at such prices as could be obtained, regardless of any minimum and the proceeds were to be paid to or expended for the Indians regardless of the manner of sale.

Sec. 8, Act of April 27, 1904, (33 St. at L. 352) expressly provides that the United States shall act as “trustee to dispose of said lands for said Indians”.

It clearly was the intention of Congress not to purchase said lands, but in pursuance of the policy which it had adopted towards other Indian reservations in Montana, it desired merely to open up the lands to settlement by selling them for the benefit of the Indians. To show that this contention is correct it is fitting at this time to refer to a section which is contained in Acts opening up the Crow, Fort Peck, Flathead and Blackfeet Indian Reservations in the State of Montana, which is as follows:

“That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received

from the sale thereof only as received, as herein provided.”

Flathead Reservation, Act of April 23, 1904,
33 St. at L. 302;

Crow Reservation, Act of April 27, 1904, 33
St. at L. 352;

Blackfeet Reservation, Act of Mar. 1, 1907,
34 St. at L. 1035;

Fort Peck Reservation, Act of May 3, 1908,
35 St. at L. 558.

In construing treaties and Acts opening Indian reservations to settlement even when the treaty or Act failed to contain any express declaration of trust but did provide for the sale of the lands by the United States for the benefit of the Indians, the courts have held that the United States did not take the absolute title to the lands opened for settlement and sale, but only acted as a trustee.

“By the two treaties of 1832 and 1834 the United States undertook a general supervision and care of the Chickasaws; a supervision and care more detailed in definition, more important in essence, than that of trustee to cestui que trust, or even that of guardian to ward, in effect much resembling the relation of parent to child. The Indian lands were to be surveyed and sold by the United States; the proceeds were to be invested and held for the Indians by the United States. The agent, the land surveyor, register and clerks, paid for by the Indians, were to be

named by the United States; the Indians were not to go to war without the consent of the United States, except in self-defense, and then were to be protected by the United States—in fact, without proceeding further with an analysis of the two treaties, it may be assumed that any one who examines them will find the Government accepting most exceptional and almost parental relations towards the Indians.”

“The nation was oppressed (Art. I, Treaty 1832) by being made subject to State jurisdiction. Rather than submit to such an evil they preferred to seek a new home, where they might live and be governed by their own laws. Sympathizing with them and agreeing with them, the President entered into the treaties—treaties manifestly intended to protect the Indians, to guard them so far as possible from the hardships and evils of enforced emigration. The United States assumed therefore a peculiar trust, a trust of guardianship and control; a trust not only financial but largely personal in its nature.”

Chickasaw Nation vs. United States, 22 Ct. Claims, 222.

Holden vs. Joy, 17 Wall. 211;

Choctaw Nation vs. United States, 119 U. S. 1.

By the original treaty with the Crow Indians, ratified and accepted by Congress July 25, 1868, (15 St. at L. 649), and the agreement as amended and accepted and ratified by the Act of April 27, 1904,

(33St. at L. 352), practically the same relations were created and established between the United States and the Crow Indians, as were created and established between the United States and the Chickasaw Indians by the two treaties referred to in *Chickasaw Nation vs. United States*, supra, the treaties refered to, however failing to contain any express declaration of trust while the Act of April 27, 1904, amending and ratifying the agreement made with the Crow Indians does contain such a declaration in express terms.

It is true that in Article I of the original agreement and in Article I of the agreement as amended by the Act of April 27, 1904, it is stated that the Indians of the Crow reservation "do hereby cede, grant, and relinquish to the United States all right, title and interest which they may have in the lands embraced within and bounded by the following described lines;" as the agreement stood before being amended by Congress these words should be given their ordinary meaning as by the agreement it was intended that the United States should obtain the absolute title to said lands, but in the light of the amendments made to said agreement whereby the United States did not assume to acquire the absolute title to said lands but only to act as a trustee in the sale and disposal of the same, these words should be given a restricted meaning so that all articles of the amended agreement and all provisions of the Act amending and ratifying the same will be harmonious.

Worcester vs. Georgia, *supra*;

Choctaw Nation vs. United States, *supra*;

The Kansas Indians, *supra*.

The Act of April 27, 1904, amending and ratifying said agreement provides that said lands shall be subject to entry under the homestead, mineral land, townsite and reclamation laws of the United States. This provision, however, intended nothing more than that the general provisions in those laws relating to manner of procedure in making entry and final proof, establishment of residence, length of residence, cultivation and improvements should apply to entries made on these lands. It was not intended by these provisions that any of these lands should be acquired in the same manner that public lands generally are acquired under these laws. If it had been intended by this Act that this land was to be entirely segregated from the Indian Reservation and cease to be a part thereof and should become public lands and that all of the rights of the Indians thereto were to be immediately extinguished upon the passage and approval of said Act then all of said land would have become public land subject to entry not only under the homestead, mineral land, townsite and reclamation laws, but also under the desert land act and the timber and stone act. By the conditions contained in said Act specifying the particular manner in which said lands might be acquired, the prices to be paid for the same, and the disposal of the proceeds of such sales, it is clear

that Congress did not intend to have these lands revert to the public domain and become public lands, but intended them to remain within the boundaries of said reservation subject to entry and sale as provided in said Act and not otherwise.

United States vs. Blackfeather, 155 U. S. 180.

In the case of M. K. & T. Ry Co. vs. United States, 47 Ct. Cl. 59, a case arising over the question of the extinguishment of the title of certain Indians to lands under an agreement that had been ratified by Congress, the court held that such lands did not become "public lands" under said agreement, saying:

"What was intended by the proviso to section 9 of the granting act 'Provided, That said lands become a part of the public lands of the United States'? The usual office of a proviso to a statute is too well known to require repetition. If the term 'public lands', as used in the statute, is to receive the meaning accorded it in treaties and public laws, it means 'such land as is subject to sale or other disposal under general laws.' (Newhall v. Sanger, 92 U. S. 761-763; United States v. Thomas, 151 U. S. 577-583; Northern Lumber Co. v. O'Brien, 139 Fed. R., 616.) It has been suggested that the extinguishment of the Indian title and the lands becoming public lands are synonymous terms, and that the lands having been public lands previous to Indian occupancy nothing afterwards supervened to change their character ex-

cept the incumbrance of the Indian title. The contention is in a measure correct, but the subvention of Indian title by means of treaty stipulation, a contract equally as sacred as the act of July 25, 1866, and for which a consideration proportionately as great passed, changed the character of the lands; they were no longer part of the public domain subject to disposal under general laws, and in the absence of express and explicit language did not pass under land-grant laws, even though not expressly reserved. It did not require a public survey to make them public lands, and upon the extinguishment of the Indian title if within the intent of the act they would have passed under the grant, for the railroad had long since definitely located its line of road.”

* * * “As provided in section 17 of the act approved April 26, 1906, *supra*, all the money arising from said sales, ‘or from any source whatever,’ was to be credited to said Indian tribes by the Treasury Department and thereafter paid to the Indians per capita. *Public lands of the United States were not disposed of in this manner then, and they are not so disposed of now.* (Italics ours.)

The Supreme Court of the United States has defined the meaning of the words “public lands” as follows:

“The words ‘public lands’ are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.”

Newhall vs. Sanger, 92 U. S. 761-763.

Cited with approval in M. K. & T. Ry. Co.
vs. U. S., *supra*.

These particular lands not being subject to sale or other disposal under general laws relating to the sale and disposal of public lands, but only being subject to sale and disposal in accordance with the terms of the Act amending and ratifying said agreement, they were segregated from the public lands of the United States when the original treaty was ratified by Congress and proclaimed by the President on August 25th, 1868, and have never been public lands since that date.

By the terms of the agreement as amended and ratified by the Act of April 27th, 1904, the United States was simply to act as a trustee for said Indians in the sale of said lands, said lands were not withdrawn from the Indian Reservation, and said Indians retained the right to use and occupy the same until such time or times as said lands were entered by persons desiring to acquire title to the same in accordance with the provisions of said Act. After such entries were made such right would be held in abeyance being finally extinguished upon the completion of title by and issuance to said entrymen of patent by the trustee or again attaching if such entrymen should abandon their entries.

THE AUTHORITY OF THE SECRETARY TO ISSUE GRAZING PERMITS.

That the Secretary of the Interior has power and authority to permit stock to graze on lands included within the boundaries of Indian reservations and to make and promulgate rules and regulations concerning the same and providing for the issuance of permits therefor, and that the Secretary of the Interior has made and promulgated rules and regulations concerning the grazing of stock on the Crow Indian reservation and providing for the issuance of permits therefor, is not questioned, but the appellee contends in paragraphs II and III of its answer, (Tr. pp. 11-12), that these lands were granted, relinquished and ceded to the United States by the agreement between the Crow Indians and the United States; that by the ratification of such agreement, after amendment, the right and title of the Indians were extinguished; that said lands immediately were added to the public domain and became public lands of the United States, and that therefore, said lands are not subject to the rules and regulations made and promulgated by the Secretary of the Interior concerning Indian lands and that the appellee has the right to graze its sheep on said lands in exactly the same manner that it has to graze its sheep on other public lands.

If, as contended by the appellee, these lands, by the amendment and ratification of such agreement, were added to the public domain and became

public lands upon the passage and approval of the Act amending and ratifying said agreement then the rules and regulations concerning grazing of stock on Indian reservations would not apply to the lands in question, but, if by the amendment and ratification of said agreement said lands were not added to the public domain so as to become public lands subject to sale and disposal under general laws, but remained Indian lands until finally sold and disposed of by the United States as a trustee for said Indians, then these lands until sold or disposed of by the trustee remained subject to the rules and regulations concerning grazing of stock on Indian reservations exactly the same as the unallotted Indian lands included in those portions of said reservations not opened to settlement. However, conceding merely for the purpose of argument, that the lands having been opened to settlement and sale under the terms of the agreement as amended and ratified, the rules and regulations concerning the grazing of stock on Indian reservations do not apply to such lands, yet, unless said lands became public lands of the United States subject to sale and disposal under general laws, the appellee has no more right to graze its sheep on said lands than it has to graze its sheep on lands owned by private individuals without permission so to do. The right of the appellee to graze its sheep on these lands depends entirely on the question of whether or not these lands were, by the Act amending and ratifying said agreement, added to the public domain and be-

came public lands. If by said Act the lands became public lands in every sense of the word then the appellee has such a right but if by said Act the lands did not so become public lands, the United States simply taking title thereto as a trustee to sell and dispose of the same for the benefit of said Indians, the appellee has no such right.

In its opinion (Tr. pp. 21-22), the court found, in substance, that if a trust was created by the Act ratifying said agreement, after amendment, such trust attached only to the proceeds of sales of the land and not to the land, and that even if a trust did attach to the land it was a trust to sell and gave no power to lease. From an examination of the Act amending and ratifying the agreement, we do not believe there can be any question but what a trust was created which attached not only to the proceeds of sales of said land but also attached to the land itself, and if such a trust was created which attached to the land it can make no difference to the appellee if it was a trust to sell and gave no power to lease. It is a principle, so well established that it requires no citation of authorities to sustain it, that the cestui que trust is the only person who can question the power or authority of a trustee to handle and manage the trust property. The Crow Tribe of Indians, in this particular instance, being the cestui que trust, might question the power and authority of the trustee, the United States, to issue permits for the grazing of stock on these lands, on the ground that the trust only grant-

ed power to sell and not to lease, but the appellee, having no beneficial interest in any of these lands, certainly cannot question the manner in which the terms of the trust are being carried out by the trustee, or the manner in which the trustee is handling or managing the trust property not being a party to the agreement creating such trust and having no interest of any kind in the trust property.

THE DECREE.

The Act amending and ratifying the agreement having created a trust which attached to the lands, and the lands not being added to or becoming a part of the public domain and public lands but being held in trust by the trustee to be sold and disposed of for the benefit of said Indians, the bill of complaint did state a cause for relief in equity and the appellant was entitled to the relief prayed for in the bill of complaint. The court therefore erred in holding that said bill of complaint did not state a cause for relief in equity and in holding that the appellant was not entitled to relief in equity as prayed for in the bill of complaint, and in entering the decree dismissing the appellant's bill of complaint.

It is respectfully submitted that the decree in this case should be reversed and the cause remanded to the District Court of the United States for the District of Montana, with instructions to enter a decree granting the injunctive relief prayed for by

appellant in its bill of complaint and the damages sustained by appellant ascertained and judgment for such amount included in such decree.

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NO. 2484

IN THE
United States Circuit Court of Appeals
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UNITED STATES OF AMERICA,

Appellant,

vs.

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Appellee.

BRIEF OF APPELLEE.

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Filed

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BRIEF OF APPELLEE.

Appellant's action depends primarily, if not wholly upon the contention that the lands in question are still a part of the Crow Indian Reservation, or, in the language of the complaint, "that all of the said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana."

This contention cannot be sustained without doing violence to the very act on which appellant relies (Act approved April 27, 1904) and without wiping out its most important provisions.

Under that Act, and the agreement thereby confirmed, (with amendments) the Indians "cede, grant and relinquish to the United States all right, title and interest which they may have to the lands embraced," etc. (describing a part

of the then existing reservation). The terms of the cession are absolute.

It is well understood that the Indians had no title, but only a right of occupancy in the lands set aside for them as a reservation.

Spaulding v. Chandler, 160 U. S. 394-407.
Johnson v. McIntosh, 8 Wheat 543.

It is well settled that the right of occupancy of Indians can be ended by Act of Congress, as well as by treaty or agreement with the Indians.

Same authorities and
Beecher v. Wetherby, 95 U. S. 517.
Buttz v. Northern Pac. R. R. 119 U. S. 73.
Lone Wolf v. Hitchcock, 187 U. S. 553.

When the right of occupancy is ended or abandoned with the approval of the United States all the Indian rights are extinguished.

Buttz v. N. P. R. R. Co., Supra.
United States v. Cook, 19 Wall. 591.

The Act of 1904 and the original agreement both contemplated and provided for the ending of the Indian occupancy and the removal of the Indians to the "diminished reservation." Article IV provided as follows:

"Art. IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary, be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States."

"Art. III. All lands upon that portion of the reservation hereby granted, ceded, and relinquished which

have, prior to the date of this agreement, been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said reservation not hereby ceded, granted, or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvements shall be so sold."

Section 4 of the Act, after providing for allotments in pursuance of Article III, contains the following:

"The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall so fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold."

The intention thus clearly indicated was that the Indians should remove to the "diminished reservation" except in the case of those Indians entitled to allotments in severalty in the ceded portion who elected to remain there. It is, of course, well understood that allotments in severalty do not continue in existence "Indian rights" as such.

If the lands are still part of the reservation they are still subject to the laws relating to "Indian Country." It seems self-evident that when lands are thrown open to exploration and settlement they are no longer "reserved." But counsel argue that they are not subject to entry under the desert or

timber and stone act. Even so. No definition of the term "public lands" requires that the lands be open to entry under all the general laws relating to land. Vacant mineral lands of the United States are surely "public lands." Yet "lands valuable for minerals * * * are reserved from sale, except as expressly directed by law," and when known to be valuable for minerals can only be sold under the mining laws. If the argument were sound, mineral lands would not be "public lands." The definition quoted from *Newhall v. Sanger* applies to lands "subject to sale, or other disposition, under general laws." The homestead, townsite and mineral laws are each and all general laws. The lands in question are subject to sale and disposition under said laws. The price to homesteaders is changed, but that is only a detail.

The language of the Act of 1904 is quite explicit regarding the disposition to be made of the lands. Section 5, after providing for allotments by the Commissioner of Indian Affairs to Indians entitled thereto,—which allotments were to be made prior to the opening of the lands to settlement or entry,—and after providing also for school sections and for the withdrawal of lands under the Reclamation Act, contains the following:

"That the lands not withdrawn for irrigation under said reclamation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of the United States, and shall be open to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; * * *

"Lands entered under the town-site and mineral-land

laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments * * * * the entry shall be held for cancellation and canceled."

If appellant's view were correct, what would be the position of a homesteader or of a purchaser from the state? Here it may be noted that the rights of the state to school sections, or to sections acquired in lieu thereof under the provision of the Act, attached and became fixed before the land was thrown open to settlement. The state has a right to sell lands. The land of a homesteader or of a purchaser from the state might be entirely surrounded by lands not yet sold. If so, he might find all access to his land barred by a lessee or lessees of the Indian Department, who, under the regulations of the Indian Department, might fence up all the leased lands. A homesteader or purchaser from the state could not rely on any statutory provision relating to "public lands." He could not rely on the prohibitions contained in Section 3 of the Act of February 25, 1885, against preventing or obstructing free passage over public lands; for, according to appellant's theory, the lands would not be public.

We submit that there can be no middle ground and no intermediate state or condition. These lands are either reservation lands or are public lands. They cannot be both. Nor can they be part "Indian" or "reservation" and part "public" or "free." The statutes which relate to public lands and those which relate to reservation lands or Indian lands are so radically different that they cannot be applied at the same time in

the same district. The confusion that would result from such an attempt would be so great that such a view should not be entertained unless there was some express statutory provision from which there was no escape.

The only consistent and reasonable conclusion is that these became "public" when they were thrown open for settlement if not before. Such being the character of the lands, the action cannot be sustained.

Buford v. Houtz, 133, U. S. 320.

THE SO-CALLED TRUST.

Counsel argue next that these lands are held in trust by the United States for the Indians. If this were correct, it would still be true that they were no longer "reserved," or "reservation," or "Indian" lands. They would no longer be reserved or excepted from entry or "withdrawn" for any purpose. Insofar as the public are concerned, they are in fact open to entry by homesteaders; they are open to exploration and location by prospectors. The title of the state to school sections or to lieu sections has become fixed. These can be sold or leased by the state. It goes without saying that the homesteader or locator, or the purchaser or person claiming under the state must have a right of ingress and egress to and from his land. How then can these lands be distinguished from the rest of the public lands? It will hardly be contended that leave must be obtained from the Indian agent or the Indian Department to enter upon them, with a view to exploration or to settlement and entry, or to visit a lawful resident, or to drive across these lands.

However, let us see whether the so-called trust affects the lands.

Will it be contended that Congress intended to limit or modify the title of the United States? The United States was already owned in fee absolute; all that the Indians ceded was their right of occupancy. Congress might have put an end to the right of occupancy by the Indians, even without treaty or agreement. (Authorities *supra*). Can it then be consistently maintained that Congress intended to restrict the title of the United States, or to modify it so as to give the Indians an equitable right in or to the lands themselves? The Indians had no title at all before. It is not the policy of the United States to give to the Indians any title except upon the breaking up of the tribal relations, and then only in severalty. Are we to assume that Congress intended a reversal of that policy, even to the extent of conferring an equitable title upon the Indians? There was no reason therefor.

We submit that the correct view is, that the "trust" was simply an undertaking to treat the proceeds as trust funds and to act in the matter of the sale as a trustee might act. Such a trust cannot properly be held to affect the title of the sovereign, or to affect the land at all. Moreover, if we observe the language used, we see that there is no trust to "hold for the Indians," or "to care for," or "to manage," or "to lease" the lands.

To all intents and purposes and whatever the obligations of the United States to the Indians may be, the lands must be regarded as "public lands" for there is no way to distinguish them from such as are unquestionably public lands.

THE RIGHT TO LEASE.

It really matters but little whether the leases alleged in the complaint can be questioned in this case or not. They are entirely immaterial. The alleged leases cannot be made the foundation of appellant's right of action. They cannot enlarge appellant's rights. But it is to be kept in mind that it is the appellant who alleges the existence of these leases and who seeks to make a point of them. How then can it be argued that their validity is not open to question? The allegations being made, they may be denied. If denied, they must be proved. If they must be proved, it must appear that they are lawful leases. The leases are invalid. They were not granted by Congress but by a departmental officer. This officer could not grant the leases without express authority of law. He must have authority of law or his acts are void. The Indian Department assumes to act under a remnant of authority supposed to be left in it, under the theory that the character of Indian lands still, in some measure, attaches to the unsold portions of the region in question. There is no express statutory authority. None can be implied from the Act in question. It must be evident that whatever be the legal status of these lands, control over them by the Indian Department has come to an end. Moreover, the departmental officer is not himself a trustee. He is a mere agent. Even if a theoretical right to lease on behalf of the United States were assumed to exist, statutory authority would be required to authorize any department or departmental officer to make leases.

The point sought to be made by appellant, that a stranger cannot complain of the acts of a trustee, does not apply at all.

Alleged acts of a trustee, if put in issue, must be proven. So the acts of an alleged agent of a trustee. In the latter case the agency would have to appear, and if no lawful agency appears, the acts of the alleged agent cannot be considered as lawful acts or as having been proved. In this case, plaintiff alleging leases, must show leases made by competent authority, or his proof as to the leases would fail. Therefore, the leases in question cannot help the plaintiff. No authority for the making of the leases can be found. The Indian Department is given no authority whatever by the act or by any other law applicable to the case. It cannot exercise any authority in the premises that would conflict with the rights of settlers, with the powers of the land office, and with the whole spirit of the Act.

Respectfully submitted,

C. B. NOLAN,

WM. SCALLON,

For Appellee.

No. 2334

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING.

ASH SHEEP COMPANY,
By C. B. NOLAN,
WM. SCALLON,
Its Solicitors.

Filed

APR 3 - 1915

F. D. [illegible]

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING.

The appellee, Ash Sheep Company, respectfully petitions this Honorable Court for a rehearing in the above entitled cause, particularly with respect to the money judgment prayed for in the bill of complaint and in support of this petition, the appellee respectfully shows:

That in the bill of complaint herein, the appellant asks to recover the sum of seventy-one hundred dollars for and on account of grazing of sheep, on the lands in question, by the appellee, it being alleged in paragraph V (Tr. p. 4) that since the 14th day of July, 1913, the defendant had been grazing about seventy-one hundred head of sheep upon the lands in question "in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid." The act referred to is the act relating to the Crow Indian reservation. The amount asked for is at the rate of one dollar a head. That is the amount of the penalty provided for by Section 2117 of the Revised Statutes of the United States, which reads as follows:

“Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.”

This is clearly a penalty. It is well settled that equity never enforces a penalty.

In

Marshall v. Mayor and City Council of Vicksburg,
15 Wall. 146,

it is said:

“Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.” (Citing *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Story Equity Jurisprudence*, 2nd Vol., Section 1319).

Story in the section referred to says:

“It is a universal rule in equity never to enforce a penalty or a forfeiture.”

The rule is thus positively established that a penalty will not be enforced in an equitable action. The suit at bar is one in equity. It, therefore, follows that the penalty cannot be recovered in this action, if at all, and that part of the prayer of the bill which relates to the penalty cannot be granted. Objection was specifically raised by the answer to the joinder of this claim for penalty. The answer averred:

“Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoinder of causes of action.

"Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity." (Tr. pp. 14-15).

These defenses were thus properly presented. (Equity Rule 29). The plaintiff may not join causes of action not cognizable in equity. Rule 26 permits the joinder of causes of action "cognizable in equity," but does not permit the joinder of actions not cognizable in equity with equitable causes.

Moreover Section 2117 does not, and can not apply in this case. That section applies to land of which the tribe has possession, and over which it exercises control. That is evident from the clause "without the consent of such tribe." The lands here in question were not in the possession or under the control of the tribe. The decision holds that they were not public lands, but were "lands held by the United States as trustee for the Crow Indians, for disposal," etc.

The Indians had been removed, and the lands were held for sale and open to entry in pursuance of the provisions of the act of cession. The tribe could not have given any consent as to these lands. So, they were not within the spirit or the letter of Section 2117.

This contention is altogether consistent with the decision of this Court, regarding the character of the lands.

The answer also contains the following denials. In subdivision VI of the answer (Tr. page 13), after admitting the grazing, comes this denial:

"Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands."

In sub-division VII (Tr. page 14), are the following denials:

“Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.

“Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant.

“Further replying to said paragraph, denies that complainant is without remedy at law, and denies that relief is obtainable only in equity.”

The bill having been dismissed on its merits, the decree of the court below made no reference to these points, but the reversal of the decision makes it necessary to consider them. Appellee, therefore, respectfully represents that it should not be ordered that a decree be entered in favor of the complainant for the relief prayed for in its bill, but the order should be limited to granting to the complainant the injunction prayed for, and that, regarding the money judgment sought to be recovered, the bill should be dismissed, or the money recovery limited to nominal damages. Appellee does not go to the extent of asking that the whole bill be dismissed on account of the misjoinder, but it does respectfully insist that the money matter should be eliminated by dismissal, or disposed of as above suggested.

The money demand can only be for one of these two things, viz, the statutory penalty, or, unliquidated damages. If the claim be for the penalty, it must be denied, because equity will not enforce it, and because of the misjoinder as well as because Section 2117 does not apply. If the claim for money

be regarded as one for unliquidated damages for trespass, then, we make three points regarding it:

1st: If it could be deemed to be cognizable in equity in this case, substantial damages could not be allowed, because the damages were denied in the answer, issue was made in respect thereof, and no evidence of damages was given. The case was submitted upon the bill and answer as appears by the decree. (Tr. page 23). Therefore, only nominal damages could be allowed, if any.

2nd: By submitting the case upon the bill and answer, the plaintiff waived any claim to substantial damages. It is, of course, elementary that unliquidated damages (unless admitted) can not be recovered without proof. The rule applies even in default cases. By submitting the case without evidence, the plaintiff necessarily abandoned all claim to substantial damages.

3rd: If the money claim be not cognizable in this case, then, of course, no money recovery can be had in this action.

WHEREFORE the appellee, without waiver or prejudice regarding other parts of the decision, respectfully prays that a rehearing be granted and that upon such rehearing the decision and order made by this Honorable Court be modified, as above suggested, with respect to the money demand contained in the bill of complaint.

ASH SHEEP COMPANY,

By C. B. NOLAN,

WM. SCALLON,

Its Solicitors.

CERTIFICATE OF COUNSEL.

We the undersigned, C. B. Nolan and Wm. Scallon, of counsel for the appellee, the Ash Sheep Company, now petitioning for re-hearing, certify that the foregoing petition for re-hearing is, in our judgment, well founded, and that it is not interposed for delay.

C. B. Nolan

Wm. Scallon

No. 2437

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

D. W. STANDROD & COMPANY, a Corproation,
as Trustees for the IDAHO LUMBER COMPANY,
Ltd., a Corporation, and for GEO.A.LOWE
COMPANY, a Corporation,

Appellant,

vs.

UTAH IMPLEMENT-VEHICLE COMPANY, a Corpora-
tion,

Appellee.

TRANSCRIPT OF THE RECORD

Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.

FILED

JUN 25 1914

No.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

O. W. STANDROD & COMPANY, a Corproation,
as Trustees for the IDAHO LUMBER COMPANY,
Idt., a Corporation, and for GEO. A. LOWE
COMPANY, a Corporation,

Appellant,

vs.

ETAN IMPLEMENT-VEHICLE COMPANY, a Corpora-
tion,

Appellee.

TRANSCRIPT OF THE RECORD

Upon Appeal from the United States District Court
for the District of Idaho, Eastern Division.

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Attorney for Frank C. Bowman, as Trustee.

JOHN W. JONES, Blackfoot, Idaho,
Attorney for E. E. Rodgers and F. C. Rodgers.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

IN EQUITY.

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy of
the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd.,
GEO. A. LOWE COMPANY, E. E. RODGERS
and F. C. RODGERS,

Defendants.

BILL OF COMPLAINT.

*To the Judges of the District Court of the United
States, for the District of Idaho,
Eastern Division.*

Utah Implement-Vehicle Company, a Corporation
duly organized and existing under and by virtue of

the laws of the State of Utah, having its principal place of business at Salt Lake City, in said State of Utah and Salt Lake City in the State of Utah being its legal residence and place of business brings this bill of complaint against Frank C. Bowman as Trustee in Bankruptcy of the estate of N. C. Mickelson, a bankrupt, a resident and citizen of the State of Idaho residing at Idaho Falls in Bonneville county, Idaho, and against D. W. Standrod & Company, an Idaho corporation having its principal place of business at Blackfoot in Bingham county and said Blackfoot, Idaho, being its legal residence and place of business, as Trustee for Idaho Lumber Company, Ltd., Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, and as grounds for the jurisdiction of this Court the plaintiff alleges and represents that this controversy is between a resident and citizen of the State of Utah as plaintiff and against residents and citizens of the State of Idaho as defendants and that the amount in controversy in this action exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs and thereupon complaining the plaintiff complains of the defendants and for cause of action against the said defendants the plaintiff alleges as follows:

FIRST.

That the plaintiff is now and was during all of the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Utah and having its principal place

of business and its place of residence at Salt Lake City in the State of Utah.

SECOND.

That the defendant, Frank C. Bowman, is and has been since April 19th, 1911, the duly appointed, qualified and acting Trustee of the estate of N. C. Mickelson, a bankrupt, by virtue of his appointment as such trustee in bankruptcy proceedings pending in the District Court of the United States for the District of Idaho, Eastern Division, and that said Frank C. Bowman is a resident and citizen of the State of Idaho residing at Idaho Falls, in Bonneville county, Idaho.

THIRD.

That on April 23rd, 1913, the said District Court of the United States for the District of Idaho, Eastern Division, by its order duly made and entered, permitted this plaintiff to bring this action for the reformation and foreclosure of the mortgage in favor of the plaintiff hereinafter described against the said Trustee and such other parties as might be necessary or proper.

FOURTH.

That the defendant, D. W. Standrod & Company is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is a citizen of the State of Idaho having its principal place of business and its legal residence at Blackfoot in Bingham county, Idaho.

FIFTH.

That in the said District Court of the United States for the District of Idaho, Eastern Division, the said N. C. Mickelson was on March 18th, 1911, by said Court duly declared and adjudged a bankrupt.

SIXTH.

That on or about the 6th day of February, 1911, the said N. C. Mickelson and Ruby Mickelson, his wife, executed and delivered to the plaintiff their certain promissory note in writing, dated February 6th, 1911, whereby they, or either of them promised to pay to the order of the plaintiff the sum of Twelve Thousand Five Hundred Seventy-five and 75-100 (\$12,575.75) Dollars on February 6th, 1912, together with interest thereon at the rate of eight per cent. per annum from the date of said note until due and interest thereon after the maturity of said note at the rate of twelve per cent. per annum.

SEVENTH.

That at the time of the execution and delivery of said note, in order to secure the payment thereof, the said defendants, N. C. Mickelson and Ruby Mickelson, also executed and delivered to the plaintiff their certain written mortgage, dated February 6th, 1911, mortgaging to the plaintiff the following described real estate, to-wit:

Beginning at the Northwest corner of Lots One and Two (1 and 2) of Block Eighteen (18) of the

Townsite of Shelley, Bingham county, Idaho; thence East seventy-five (75) feet; thence South one hundred and thirty-two (132) feet; thence West to East boundary line of the O. S. L. Ry. right of way; thence Northeast along said right of way to place of beginning. Also the South Half and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ $SW\frac{1}{4}$) of Section Thirty-four (34) in Township One (1) North Range Thirty-seven (37) East of Boise Meridian, together with all the improvements, privileges and appurtenances thereunto belonging.

The said mortgage was duly executed, acknowledged and certified and the same was on the 21st day of February, 1911, duly filed in the office of the Recorder of Bingham county, Idaho, and recorded in Book "30" of Mortgage Records of said county at page 79. The said mortgage is conditioned for the payment of said note and the interest thereon in accordance with the terms of said note and it provides for the payment of a reasonable attorney's fee in the event of the foreclosure thereof out of the proceeds of sale of said property and it provides that in the event of the failure to pay said note, or any interest when due that the holder of said mortgage may foreclose the same.

EIGHTH.

That at the time of the execution and delivery of said mortgage the said N. C. Mickelson did not, nor did his wife, the said Ruby Mickelson, own or have any right, title or interest in or to the Northeast

Quarter of the Southwest Quarter ($NE\frac{1}{4}$ $SW\frac{1}{4}$) of said Section Thirty-four (34), Township One (1) North Range Thirty-seven (37) East of Boise Meridian in Bingham county, Idaho, but the said N. C. Mickelson was then the legal owner and holder of the remainder of the real estate described in said mortgage and the said N. C. Mickelson was at that time the legal owner and in the possession of the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}$ $SW\frac{1}{4}$) of said Section Thirty-four (34) in the Township and Range aforesaid and the plaintiff alleges that it was the intention of the said N. C. Mickelson and his wife to describe in said mortgage and cover thereby and the intention of this plaintiff to take and receive a mortgage describing the real estate in said Section Thirty-four (34), Township and Range aforesaid, of which said N. C. Mickelson was then the legal owner, but by mutual mistake of the parties to said mortgage a mistake was made in describing the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ $SW\frac{1}{4}$) of said Section Thirty-four (34) instead of the Northwest Quarter of the Northwest Quarter of said Section Thirty-four (34), which was intended and the plaintiff alleges that it was the intention of the parties to said mortgage therein to describe and thereby mortgage, as the security for the payment of the aforesaid mortgage to the plaintiff the following described real estate, to-wit:

Beginning at the Northwest corner of Lots One and Two (1 and 2) of Block Eighteen (18) of the

Townsite of Shelley, Bingham county, Idaho; thence East seventy-five (75) feet; thence South one hundred thirty-two (132) feet; thence West to the East boundary line of the O. S. L. Ry. right of way; thence Northeast along said railroad right of way to the place of beginning. Also the South Half of the Southwest Quarter ($S\frac{1}{2} SW\frac{1}{4}$) and the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4} SW\frac{1}{4}$) of Section Thirty-four (34) in Township One (1) North of Range Thirty-seven (37) East of B. M., together with the improvements, privileges and appurtenances thereunto belonging.

NINTH.

That said note has not been paid, nor has any part thereof been paid, nor has the interest upon said note or any part thereof been paid.

TENTH.

That Twelve Hundred (\$1200.00) Dollars is a reasonable attorney's fee for the foreclosure of said mortgage and that the plaintiff has obligated itself to pay its attorneys in this action a reasonable attorney's fee for the foreclosure of said mortgage.

ELEVENTH.

That the Idaho Lumber Company, Ltd., on February 7th, 1911, filed its claim of a mechanic's lien against the said real estate, hereinbefore described, situate in the village of Shelley, Bingham county, Idaho, in the office of the Recorder of Bingham county, Idaho, which was recorded in Book "3" of

Lien Records of said county at page 172, claiming a lien thereon for Two Thousand Three Hundred Ninety-nine and 98-100 (\$2,399.98) Dollars and afterwards on September 5th, 1911, the said Idaho Lumber Company, Ltd., filed its complaint in the District Court of the Sixth Judicial District of the State of Idaho in and for Bingham county, against F. C. Bowman, Trustee in Bankruptcy of the estate of N. C. Mickelson, bankrupt, for the foreclosure of said lien.

That on March 7th, 1911, one P. J. Johnson filed in the office of the Recorder of Bingham county, Idaho, his claim of mechanic's lien against said premises situate in the village of Shelley, Idaho, and which lien was recorded in Book "3" of Lien Records of said county at page 174, said lien being for One Hundred Thirty-four and 25-100 (\$134.25) Dollars and afterwards on April 10th, 1911, said P. J. Johnson filed his claim of lien against said premises situate in the village of Shelley, Idaho, claiming Thirty-seven and 50-100 (\$37.50) Dollars, which lien was filed in the office of the Recorder of Bingham county, Idaho, and recorded in Book "3" of Lien Records of said county at page 177 and thereafter on November 20th, 1911, the said P. J. Johnson filed his complaint for the foreclosure of said liens in the District Court of the Sixth Judicial District of the State of Idaho, in and for Bingham county, against the said N. C. Mickelson as defendant.

That on January 2nd, 1911, a certain mortgage from N. C. Mickelson to E. E. Rodgers and F. C.

Rodgers, securing the payment of Three Thousand (\$3,000.00) Dollars and interest, dated November 29th, 1910, covering the said premises hereinbefore described situate in the village of Shelley, Idaho, was filed in the office of the Recorder of said Bingham county, Idaho, on January 2nd, 1911, and recorded in Book "30" of Mortgage Records of said county at page 58 and afterwards on the 11th day of January, 1912, the said E. E. Rodgers and F. C. Rodgers filed their complaint for the foreclosure of said mortgage in the District Court of the Sixth Judicial District of the State of Idaho in and for Bingham county against N. C. Mickelson and Frank C. Bowman, Trustee in Bankruptcy of the estate of N. C. Mickelson, bankrupt, as defendants.

That Geo. A. Lowe Company on March 10th, 1911, filed its claim of mechanic's lien against the said premises in Shelley, Idaho, for the sum of Eight Hundred Forty-seven and 61-100 (\$847.61) Dollars in the office of the Recorder of Bingham county, Idaho, and said lien was recorded in Book "3" of Lien Records of said county at page 175 and afterwards on September 5th, 1911, said Geo. A. Lowe Company filed its complaint for the foreclosure of said lien in the District Court of the Sixth Judicial District of the State of Idaho in and for Bingham county, against F. C. Bowman, Trustee in Bankruptcy of the estate of N. C. Mickelson, bankrupt, as defendant.

That Crane Company filed its claim of lien against the said premises situate in Shelley, Idaho, on March

11th, 1911, in the office of the Recorder of said Bingham county, which said lien was recorded in Book "3" of Lien Records of said county at page 176, the said claim of lien being for One Thousand Four Hundred Thirteen and 24-100 (\$1,413.24) Dollars and afterwards on April 8th, 1911, said Crane Company filed its complaint for the foreclosure of said lien in the District Court of the Sixth Judicial District of the State of Idaho, in and for Bingham county, against N. C. Mickelson as defendant.

That on May 1st, 1911, one D. F. Hagans filed his claim of mechanic's lien against the said premises situate in Shelley, Idaho, claiming the sum of Three Hundred Thirty-seven and 97-100 (\$337.97) Dollars and said lien was recorded in Book "3" of Lien Records of said county at page 179 and thereafter on November 1st, 1911, said D. F. Hagans filed his complaint in the District Court of the Sixth Judicial District of the State of Idaho, in and for Bingham county for the foreclosure of said lien against F. C. Bowman, Trustee in Bankruptcy of the estate of N. C. Mickelson, bankrupt, as defendant.

That afterwards all of the said actions, hereinbefore in this paragraph mentioned, were by order of the said District Court of the Sixth Judicial District of the State of Idaho, in and for Bingham county, consolidated and thereafter a judgment was entered in said consolidated action foreclosing said Rogers mortgage and all of the said liens in this paragraph described and ordering the said premises situate in the village of Shelley, Idaho, sold to satisfy

the same, said judgment being dated and filed in said Court on May 31st, 1912, and afterwards the said District Court, by its order and judgment entered in said consolidated action, dated November 25th, 1912, and filed in said Court on November 25th, 1912, corrected its conclusions of law and judgment, as theretofore entered in said consolidated action, in which said last mentioned order and judgment the priorities and the order of said Court as to distribution of the proceeds of sale of said property was changed. That afterwards an execution was issued upon said judgment rendered and entered in said consolidated actions to the Sheriff of Bingham county and said Sheriff of Bingham county, Idaho, under and in pursuance of said execution, sold the said premises hereinbefore described situate in the village of Shelley, Idaho, to the defendant D. W. Standrod & Company, as Trustee for said Idaho Lumber Company, Ltd., and for said Geo. A. Lowe Company and for said E. E. Rodgers and for said F. C. Rodgers for the sum of Six Thousand Seven Hundred Twenty-eight and 41-100 (\$6,728.41) Dollars and the said Sheriff issued his certificate of sale of said premises to the said D. W. Standrod & Co. and filed the duplicate thereof with the Recorder of said Bingham county and the said Sheriff, after paying his fees, commissions and expenses on said sale, amounting to One Hundred Twenty-one and 65-100 (\$121.65) Dollars distributed the balance of the proceeds of said sale, amounting to Six Thousand Six Hundred and Six and 76-100 (\$6,606.76) Dollars,

to the parties to said consolidated action as follows:

To Idaho Lumber Company, Ltd., Eight Hundred Seventy-six and 38-100 (\$876.38) Dollars;

To E. E. Rodgers and F. C. Rodgers Four Thousand and One Hundred and Nine and 39-100 (\$4,109.39) Dollars;

Geo. A. Lowe Company One Thousand One Hundred Twelve and 55-100 (\$1112.55) Dollars;

P. J. Johnson Two Hundred Seventy-four and 77-100 (\$274.77) Dollars;

D. F. Hagans Two Hundred Thirty-three and 67-100 (\$233.67) Dollars.

That all of the said liens were filed and recorded more than two years prior to the date of the filing of this bill of complaint and that the plaintiff herein was not a party to any of said actions for the foreclosure of said liens and mortgage in this paragraph described and no attempt has been made to enforce said mechanic's liens, claimed as aforesaid, or any of them, as against this plaintiff, nor has any attempt been made to enforce said mortgage in favor of E. E. Rodgers and F. C. Rodgers as against this plaintiff and the plaintiff alleges that the time for the commencement of an action or actions against this plaintiff for the foreclosure of said alleged mechanic's liens and all of them has expired under the provisions of Section 5118 of the Idaho Revised Codes and all of the said liens are barred, as against this plaintiff, by the provisions of Section 5118 of the Idaho Revised Codes and the plaintiff alleges that as

to this plaintiff the said alleged liens stand as if none of them had ever been foreclosed and the said alleged mortgage in favor of E. E. Rodgers and F. C. Rodgers stands the same as if it had never been foreclosed and the plaintiff alleges that the rights, liens, and interest of the defendants, D. W. Standrod & Company, as Trustee as aforesaid, or otherwise, in or to or against the said premises situate in the village of Shelley, Idaho, are junior, inferior and subject to the lien of the mortgage in favor of this plaintiff hereinbefore described, except as to any rights; or lien which the said D. W. Standrod & Company as Trustee, as aforesaid, may have acquired or be entitled to by subrogation to the mortgage lien in favor of E. E. Rodgers and F. C. Rodgers, but as to said mortgage in favor of E. E. Rodgers and F. C. Rodgers this defendant has not sufficient information to enable it to state whether there is anything due under or upon said mortgage, or not and for that reason and in order to put the defendant, D. W. Standrod & Company, upon its proof as to any right or lien it may have under said Rodgers mortgage the plaintiff alleges that there is no amount whatever due or unpaid under or upon said Rodgers mortgage and that the defendant, D. W. Standrod & Company, as Trustee, as aforesaid, or otherwise, has no right, title or interest in or to or any lien upon the said premises situate in the village of Shelley, Idaho, hereinbefore described, as against this plaintiff.

TWELFTH.

That the said mortgaged real estate intended to be covered by said mortgage and being the premises situate in said Section Thirty-four (34), are incumbered by a first mortgage thereon filed in the office of the Recorder of Bingham county, Idaho, on November 5th, 1910, securing the payment of the sum of One Thousand (\$1,000.00) Dollars and interest in favor of Bowen Curley and which has been assigned by the said Bowen Curley to one James O. Crosby and also by a certain second mortgage for the sum of One Hundred (\$100.00) Dollars in favor of the said Bowen Curley, recorded November 26th, 1910.

THIRTEENTH.

That the said mortgaged premises are wholly insufficient to pay the indebtedness secured by the plaintiff's said mortgage and the value of said premises intended to be covered by said mortgage and last hereinbefore fully described are not of the value of the amount due to the plaintiff under its said mortgage.

WHEREFORE, plaintiff prays that its said mortgage, hereinbefore described, may be reformed so as to describe and cover the following described real estate, to-wit:

Beginning at the Northwest corner of Lots One and Two (1 and 2) of Block Eighteen (18) of the Townsite of Shelley, Bingham county, Idaho, thence East Seventy-five (75) feet; thence South One hundred Thirty-two (132) feet; thence West to the East

boundary line of the O. S. L. Ry. right of way; thence Northeast along said railroad right of way to the place of beginning. Also the South Half of the Southwest Quarter ($S\frac{1}{2} SW\frac{1}{4}$) and the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4} SW\frac{1}{4}$) of Section Thirty-four (34) in Township One (1) North of Range Thirty-seven (37) East of Boise Meridian, together with the improvements, privileges and appurtenances thereunto belonging.

That plaintiff may have an accounting of the amounts due to it under its said mortgage, including interest, costs of this suit and attorney's fees; that a decree may be entered finding that the plaintiff has a valid and subsisting lien upon the real estate described in said mortgage as reformed and as described in this prayer for the sum of Twelve Thousand Five Hundred Seventy-five and 75-100 (\$12,575.75) Dollars, together with interest thereon at the rate of eight per cent. per annum from February 6th, 1911, to February 6th, 1912, and at the rate of twelve per cent. per annum after February 6th, 1912, and also together with Twelve Hundred (\$1200.00) Dollars attorney's fees and the costs of this action and finding that the rights, liens or interests of the defendants in or to or upon said premises are junior, inferior and subject to the lien awarded to the plaintiff under its said mortgage upon the real estate in this prayer described and that the defendants and all persons claiming under them, or any of them, be debarred and foreclosed of any right, claim or equity of redemption of, in or to said

last described premises and every part thereof and ordering a sale of said premises, subject to the first and second mortgages upon the land in said Section Thirty-four (34) for One Thousand (\$1,000.00) Dollars and interest and for One Hundred (\$100.00) Dollars and interest respectively, to satisfy the amounts found due to the plaintiff under its said mortgage, including interest, costs and attorney's fees and the costs and expenses of sale; that upon report of such sale and confirmation thereof a deed or deeds be executed to the purchaser or purchasers of the premises purchased and that the plaintiff may have such other and further relief as may be just and equitable and this plaintiff further prays that during the pendency of this action, after notice to the defendants of the time and place of hearing, that a Receiver of the said premises last hereinbefore described, be appointed by this Court to take charge of said premises and rent and collect the rents thereof and hold the same subject to the final decree of this Court and that by said final decree of this Court the net proceeds of the said property coming into the hands of the said Receiver after the payment of the cost of receivership be applied to any amount remaining due to the plaintiff after the application of the proceeds of sale of said premises, as provided by the decree of this Court.

CLENCY ST. CLAIR and
CHARLES C. ST. CLAIR,
Attorneys for Plaintiff.

Residence and Postoffice Address: Idaho Falls, Idaho.

State of Idaho,
County of Bonneville,—ss.

Clency St. Clair being first duly sworn upon his oath says: That he is one of the attorneys for the plaintiff in the above entitled action; that the plaintiff is a corporation as is stated in the foregoing bill of complaint and that none of its officers reside in the State of Idaho wherein this affiant resides and for that reason this verification is made by this affiant; that he has read the foregoing bill of complaint and knows the contents thereof and that he believes the facts therein stated to be true.

CLENCY ST. CLAIR.

Subscribed in my presence and sworn to before me
this 27th day of May, 1913.

(Seal)

J. M. ADAMS,
Notary Public.

(Endorsed): Filed May 29, 1913. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy,
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C. Rodg-
ers,

Defendants.

Answer of D. W. Standrod & Company, Trustee.

Comes now D. W. Standrod & Company, a corpo-
ration, as Trustee for Idaho Lumber Company, Ltd.,
Geo. A. Lowe Company, E. E. Rodgers and F. C.
Rodgers, and for answer to plaintiff's bill admits,
denies and alleges as follows:

I.

Answering the first paragraph of plaintiff's bill
it says that as to whether plaintiff is now, or was at
all times therein mentioned, a corporation duly or-
ganized and existing under and by virtue of the laws
of the State of Utah, or as to whether or not as such
corporation it has its principal place of business, or
its place of residence at Salt Lake City, in the State
of Utah, defendant is without knowledge, and upon
that ground denies said averment.

II.

Answering the second paragraph of said bill it admits and alleges that Frank C. Bowman is now, and has been at all times since April 19th, 1911, the duly appointed, qualified and acting Trustee of the estate of N. C. Mickelson, a bankrupt, in the proceedings pending in the District Court of the United States for the District of Idaho, Eastern Division, and that the said Frank Bowman is a citizen of the State of Idaho, residing at Idaho Falls, in Bonneville county.

III.

Answering the fourth paragraph of said bill defendant admits and alleges that D. W. Standrod & Company is a corporation organized and existing under and by virtue of the laws of the State of Idaho, and is a citizen of the State of Idaho, and has its principal place of business and legal residence at Blackfoot, in Bingham county, Idaho.

IV.

Answering the fifth paragraph of said bill defendant admits and alleges that in the District Court of the United States, for the District of Idaho, Eastern Division, N. C. Mickelson was, on March 18th, 1911, by said court declared and adjudged a bankrupt.

V.

Answering the sixth paragraph of said bill defendant admits that on or about the 6th day of February, 1911, the said N. C. Mickelson and Ruby

Mickelson, his wife, executed and delivered to plaintiff their certain promissory note, in writing, dated February 6th, 1911, whereby they, or either of them, promised to pay to the order of plaintiff the sum of \$12,575.75, on February 6th, 1912, with interest thereon at the rate of eight per cent. per annum from the date of said note until due, and thereafter interest at the rate of twelve per cent. per annum; but this defendant alleges that the said N. C. Mickelson and Ruby Mickelson executed said promissory note to the said plaintiff in payment of, or to secure, a pre-existing debt on the part of the makers of said note to said plaintiff; that at the time of the execution of said instrument said makers were wholly insolvent, which insolvency was well known by plaintiff and the makers of said note long before and at the time of the taking of said note and the security therefor, and that at said time there was no present consideration for the giving of said note, and no other consideration whatever, save and except to secure said pre-existing indebtedness, and that the giving of said note and the security therefor constituted and was an act of bankruptcy, and was given by the makers of said note, and accepted by this plaintiff, for the purpose and with the intention of securing preference on the part of this plaintiff over the creditors of the said N. C. Mickelson, he then and there being insolvent, as said plaintiff well knew.

VI.

Answering the ninth paragraph of said bill this defendant says that it is without knowledge as to

whether or not said note, or any part thereof, has been paid, and upon that ground denies that said note and the interest thereon has not been fully paid and discharged, and denies that any sum whatever is due thereon to plaintiff.

VII.

Answering the tenth paragraph of said bill this defendant says that said note and the mortgage given to secure the same, having been by the said N. C. Mickelson given when he was a bankrupt, and plaintiff having taken said note and security therefor, well knowing the said N. C. Mickelson to be a bankrupt, and said note and mortgage having been given without any present consideration and for the purpose of securing a pre-existing indebtedness for goods, wares and merchandise purchased by the said N. C. Mickelson from the plaintiff in the ordinary course of business, and the execution of said note and mortgage constituting and being an attempt on the part of said N. C. Mickelson to prefer said plaintiff, and having been taken by the said plaintiff with the full knowledge of such insolvency, and for the purpose on the part of plaintiff to secure a preference as against this defendant and the persons and claims mentioned in said bill for which it is acting as Trustee, it denies that \$1200.00 or any other sum is a reasonable attorney's fee for the foreclosure of said mortgage, and denies that plaintiff is entitled to recover any attorney's fee whatever for the foreclosure of said mortgage; but answering alternatively said paragraphs defendant says that if this

court should find that plaintiff is entitled to recover upon said mortgage, that \$1200.00, or any other or greater sum than \$800.00 would be an unreasonable attorney's fee for the foreclosure of said mortgage, and denies that any other or greater sum than \$800.00 is, or would be, a reasonable attorney's fee in event it be found that plaintiff is entitled to any attorney's fee.

VIII.

Answering the eleventh paragraph of plaintiff's bill this defendant admits all of the allegations therein contained, except as herein otherwise qualified, explained or denied.

And further answering said eleventh paragraph, and for an affirmative defense and by way of counterclaim and set-off to said eleventh paragraph, and to plaintiff's entire bill this defendant alleges:

(1). That all of the said persons and corporations mentioned, to-wit: P. J. Johnson, D. F. Hagens, Geo. A. Lowe Company, a corporation, and Idaho Lumber Company, Ltd., a corporation, and Crane Company, a corporation, each severally made and filed in the office of the Recorder of Bingham county, Idaho, their claims for mechanics' liens in the said several amounts mentioned in the eleventh paragraph of plaintiff's bill against the following described property, belonging to the estate of said N. C. Mickelson, a bankrupt, to-wit:

Beginning at the northwest corner of Lots One (1) and Two (2), in Block Eighteen (18), in the

town of Shelley, Bingham county, Idaho, running thence east seventy-five (75) feet, thence south one hundred thirty-two (132) feet, thence west to the east boundary line of the O. S. L. Railroad company's right of way, thence northeast along the easterly side of said railroad right of way to place of beginning.

That on the 29th day of November, 1910, for a present consideration of \$3000.00, cash then in hand paid to him by the said E. E. Rodgers and F. C. Rodgers, the said N. C. Mickelson, then an unmarried man, executed and delivered to said E. E. Rodgers and F. C. Rodgers his certain promissory note for the sum of \$3000.00, with interest and attorney's fees, according to the tenor and effect of said note, and to secure the same executed a mortgage or trust deed on said premises in this paragraph described, to the said E. E. Rodgers and F. C. Rodgers; that the consideration for the execution of said note and mortgage then paid was the said sum of \$3000.00, which said sum was used in and upon and for the construction of the building then being erected upon said premises; that all of the persons and corporations herein named as having filed mechanic's liens against the property herein described, including the said E. E. Rodgers and F. C. Rodgers, who had taken said note and mortgage against said premises long prior to the commencement of any proceedings in court, each severally obtained from the District Court of the United States, for the District of Idaho, Eastern Division, an order permitting them to pros-

ecute an action for the foreclosure of their respective liens and mortgage in the District Court of the Sixth Judicial District of the State of Idaho, in and for the county of Bingham, against N. C. Mickelson and Frank C. Bowman, Trustee in Bankruptcy of the estate of N. C. Mickelson, bankrupt; that thereafter and within the time allowed by law, said several parties herein mentioned each severally commenced actions to foreclose their said respective liens and said mortgage, and thereafter by order of said court, in which the same were pending, said actions were consolidated, and proceeded to final judgment, and said court, by its findings of fact and conclusions of law then and there having jurisdiction of said parties and the subject of said several causes of action, made and entered its final judgment and decree in said action so consolidated on the 25th day of November, 1911, and then and thereby fixed an order of priority of said respective liens and said mortgage and the amount due on each of them severally, including attorney's fees, taxes and costs; that thereafter execution was awarded against said defendant, and the premises herein described were levied upon and sold by the Sheriff of Bingham county, Idaho, according to law on the 4th day of January, 1913, at Blackfoot, for the sum of \$6728.41, and no more; that the amount of said respective liens and of said mortgage and the priority thereof, as fixed by said judgment, was in the first class to E. E. Rodgers and F. C. Rodgers, \$212.63 for taxes and interest thereon paid on said premises from December 30th, 1911,

the time of its payment; in the second class to the said P. J. Johnson, \$264.47, and to D. F. Hagans, \$224.50; in the third class to the said Idaho Lumber Company, \$842.01, and the said Geo. A. Lowe Co., \$1068.94; in the fourth class to the said E. E. Rodgers and F. C. Rodgers upon said mortgage the sum of \$3947.65; and in the fifth class to the said Crane Company, the sum of \$1749.15, each of said several amounts to draw interest from the 31st day of May, 1912, at the legal rate; that at said execution sale the Idaho Lumber Company and Geo. A. Lowe Company, and E. E. Rodgers and F. C. Rodgers, in order to protect their claims of the third and fourth classes, paid the liens of the first and second classes, then amounting to \$714.13, and accrued costs and interests, and purchased said property through and by this defendant, D. W. Standrod & Company, as their Trustee, and this defendant, as such Trustee of said trust, was by the Sheriff of Bingham county given a certificate of sale to said premises, and filed a duplicate thereof in the office of the Recorder of Bingham county.

(2). That the said P. J. Johnson in August, 1911, was employed by the said N. C. Mickelson to perform certain labor as a carpenter upon that certain building being erected upon the premises described in subdivision (1) hereof, and between August, 1910, and March 1st, 1911, said P. J. Johnson performed labor thereon to the amount of \$181.75, which said sum the said N. C. Mickelson agreed to pay therefor, no part of which has been paid, until

and except as stated in subdivision (1) hereof, and which sum became, and was then, due to the said Johnson, over and above all set-offs and counter-claims.

(3). Within the time allowed by law, the said P. J. Johnson, for the purpose of perfecting a lien upon said premises for said labor so performed, filed for record in the office of the County Recorder of said Bingham county his claim thereof, duly verified in all respects in conformity with the law; that at the time of said contract and at the time of the performance of said work and labor, the said N. C. Mickelson was the owner, and reputed owner, of said building and premises, and caused said work and labor to be done and performed.

(4). That said P. J. Johnson paid for verifying and recording said lien the sum of \$5.00.

(5). That \$50.00 is a reasonable fee to be allowed the said P. J. Johnson for the foreclosure of said lien, which sum he agreed to pay, and did pay, his said attorney.

(6). That said D. F. Hagans about September 10th, 1910, entered into a contract with said N. C. Mickelson to perform labor as a contractor, foreman and architect, in and about the construction of said building erected on the premises described in subdivision (1) hereof, for the agreed price of \$150.00; that the said Hagans performed all of the terms and conditions of said contract on his part to be performed; that said services were rendered between

the 10th day of September, 1910, and the 11th day of March, 1911, all of said work and labor being performed on said building, and the said N. C. Mickelson was indebted to the said Hagans for said labor in the sum of \$150.00, after deducting all just credits and off-sets, and no part of the sum has ever been paid, until and except as stated in subdivision (1) hereof.

(7). At the time said work and labor were performed N. C. Mickelson was the owner, and reputed owner, of the premises so described, and the buildings erected thereon, and on May 1st, 1911, said Hagans, for the purpose of securing and perfecting a lien for the money so due him, upon said buildings and lands described, filed for record in the office of the County Recorder of said county of Bingham, his claim therefor, duly verified, which claim of lien was on the same day recorded in Book 3 of Liens, page 179, of the Records of Bingham county, Idaho.

(8). That the said Hagans paid for verifying said lien the sum of \$4.00, and \$50.00 is a reasonable attorney's fee for the foreclosure of said lien, which sum said Hagans paid to his attorney for said foreclosure.

(9). The said Idaho Lumber Company, Ltd., is now, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Idaho.

(10). On August 9th, 1910, the said Idaho Lumber Company, Ltd., entered into a contract with the

said N. C. Mickelson, whereby it agreed to furnish certain building materials for the erection and construction of a certain building erected upon the premises in subdivision (1) herein described, for the agreed price of \$3848.00; that said Idaho Lumber Company performed all of the terms of said contract on its part to be performed, and the said N. C. Mickelson by reason thereof became indebted to the said Idaho Lumber Company in said sum, no part of which has been paid, except the sum of \$3212.53, leaving a balance of \$653.53, after deducting all just credits and off-sets, the last payment on account having been made April 19th, 1911; that said building materials were furnished as aforesaid between the 9th day of August, 1910, and the 9th day of March, 1911, and all of said material so furnished was used in said building.

(11). That on the 7th day of February, 1911, the said Idaho Lumber Company, Ltd., for the purpose of securing and perfecting a lien for the money so due as aforesaid, under said contract upon the building and lands described in subdivision (1), filed for record in the office of the Recorder of Bingham county, its claim therefor, duly verified, which said claim of lien was recorded in said office on said day, in Book 3 of Liens, at page 172 of the Records of said Bingham county; that said Idaho Lumber Company paid for verifying and recording said lien the sum of \$2.00; that \$150.00 was a reasonable attorney's fee to be allowed for the foreclosure of said

lien, which amount said Idaho Lumber Company agreed to pay its attorney therefor.

(12). That the said Geo. A. Lowe Company is now, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Utah.

(13). That on or about June 5th, 1910, the said Geo. A. Lowe Company entered into a contract with N. C. Mickelson, by the terms of which it agreed to furnish certain building material which was used in the erection and construction of a building then being erected upon the premises of the said N. C. Mickelson, described in subdivision (1) hereof, for the agreed price of \$878.48, which sum the said N. C. Mickelson agreed to pay the said Geo. A. Lowe Company therefor; that the said Geo. A. Lowe Company performed said contract on its part, and furnished said building material, all of which was used in said building, between the 5th day of June, 1910, and the 6th day of February, 1911, and by reason thereof said N. C. Mickelson became, and was, indebted to said Geo. A. Lowe Company, in the sum of \$878.48, no part of which has ever been paid, except the sum of \$30.78, leaving a balance of \$847.60 due the said Geo. A. Lowe Company, after deducting all just credits and off-sets.

(14). That during said times mentioned said N. C. Mickelson was the owner, and reputed owner, of said lands and premises so described.

(15). That on the 10th day of March, 1911, the

said Geo. A. Lowe Company, for the purpose of securing and perfecting a lien for said money so due it for said building material under said contract, filed for record in the office of the Recorder of said Bingham county, its claim therefor, duly verified, which said claim of lien was recorded in said office in Book 3 of Liens, at page 175 of the Records of said Bingham county; that said Geo. A. Lowe Company paid for verifying and recording said lien the sum of \$2.00.

(16). That \$150.00 is and was a reasonable attorney's fee to be allowed for foreclosing said lien, and the said Geo. A. Lowe Company agreed to pay its attorney said sum therefor.

(17). That on the 29th day of November, 1910, for a present consideration of \$3000.00 cash then in hand paid to him by the said E. E. Rodgers and F. C. Rodgers, the said N. C. Mickelson, then an unmarried man, executed and delivered to said E. E. Rodgers and F. C. Rodgers his certain promissory note for the sum of \$3000.00, payable in lawful money of the United States, at Shelley, Bingham county, Idaho, three years after date, with interest at the rate of ten per cent. per annum from date, interest payable annually; said note provided for the payment of a reasonable attorney's fee in the event of the collection thereof by action.

(18). To secure the payment of said principal sum, the interest thereof and attorney's fees and costs, according to the tenor of said note, the said

N. C. Mickelson, then a single man, executed and delivered to E. E. Rodgers and F. C. Rodgers his certain mortgage deed of even date therewith, conditioned for the payment of said sum of \$3000.00, and interest, costs and attorney's fees as specified in said note, and thereby conveyed and mortgaged to the said E. E. Rodgers and F. C. Rodgers the said premises described in subdivision (1) hereof, which said mortgage was duly acknowledged and on the 2nd day of January, 1911; recorded in the office of the County Recorder of Bingham county, in Book 30 of Mortgages at page 58 thereof.

(19). The said mortgage was conditioned for the payment of said note in accordance with its terms, and provided that in case of default in the payment of said note, or any part thereof, or if the interest be not paid, or if the mortgagor does not pay the taxes and assessments upon said premises as the same become due, that said mortgagees at their option could declare the whole sum expressed by said note immediately due and payable.

(20). Said N. C. Mickelson has not paid said note or any part thereof, nor any interest thereon, since December 30th, 1910; said N. C. Mickelson failed and neglected to pay the taxes on said premises for the year of 1911, amounting to the sum of \$206.63, which the said E. E. Rodgers and F. C. Rodgers paid on December 30th, 1911; that by reason of N. C. Mickelson's failure to pay said interest and taxes as they became due, the principal sum expressed in said note became and was immediately

due, and said E. E. Rodgers and F. C. Rodgers elected to, and did, declare the whole amount secured by said mortgage due and payable.

(21). That \$300.00 is a reasonable attorney's fee for the foreclosure of said mortgage, and said E. E. Rodgers and F. C. Rodgers agreed to pay their attorney said amount for such foreclosure.

(22). That said E. E. Rodgers and F. C. Rodgers are now, and were at all times herein mentioned, the owners and holders of said note and mortgage; that at the time of said sale heretofore mentioned in subdivision (1), on the 4th day of January, 1912, there was due and unpaid from the said N. C. Mickelson to the said E. E. Rodgers and F. C. Rodgers on said note and mortgage the sum of \$4109.39, no part of which has ever been paid, save and except as in said subdivision explained, that is to say, by the said E. E. Rodgers and F. C. Rodgers joining said lien holders, and through this defendant and cross-complainant, as Trustee, purchasing said premises.

(23). That at the time of the sale of the property described in subdivision (1) of the 8th paragraph hereof, by the Sheriff of Bingham county, Idaho, to-wit, January 4th, 1913, there was due the said P. J. Johnson upon his judgment with accrued interest the sum of \$274.77, and there was then due the said D. F. Hagans upon his judgment with accrued interest the sum of \$233.67, and there was then due the Idaho Lumber Company, Ltd., a corporation, upon its judgment with the accrued interest the sum

of \$876.38, and there was due the said Geo. A. Lowe Company, a corporation, upon its judgment with accrued interest the sum of \$1112.55, and there was then due the said E. E. Rodgers and F. C. Rodgers upon their judgment with accrued interest thereon the sum of \$4109.39; and upon said sale by the Sheriff as aforesaid the said Idaho Lumber Company, Ltd., a corporation, and the said Geo. A. Lowe Company, a corporation, and E. E. Rodgers and F. C. Rodgers apportionately paid the Sheriff's fee, commissions and expenses on said sale, amounting to the sum of \$121.65, and also paid as hereinbefore alleged the labor claims of P. J. Johnson and D. F. Hagans, amounting to the sum of \$508.44, and designated the said D. W. Standrod & Company, a corporation, their trustee for the purpose of having the said defendant herein mentioned, D. W. Standrod & Company, a corporation, purchase said premises for the amount of said Sheriff's fees, commissions and expenses on said sale, and the claims of the said P. J. Johnson and D. F. Hagans, and the claims of the said Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, and E. E. Rodgers and F. C. Rodgers, and upon said sale the respective judgments of the said Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, and E. E. Rodgers and F. C. Rodgers were satisfied to the extent of the amount of said respective judgments, and no funds as the proceeds of said sale or otherwise were distributed to the said Idaho Lumber Com-

pany, Ltd., a corporation, Geo. A. Lowe Company, a Corporation, and E. E. Rodgers and F. C. Rodgers, or any or either of them; and this answering defendant denies that the said Sheriff, after paying his fees, commissions and expenses on said sale, distributed the balance of the proceeds of said sale to the Idaho Lumber Company, Ltd., a corporation, Geo. A. Lowe Company, a corporation, and E. E. Rodgers and F. C. Rodgers, or either or any of them as alleged in paragraph eleven of plaintiff's Bill of Complaint, or otherwise or at all except as herein alleged.

(24). That at or about the time of the purchase of said premises by this defendant as such trustee, it paid the sum of \$84.04 as taxes on said premises described in subdivision (1) to protect said property from sale.

(25). This defendant and cross-complainant further alleges that said note and mortgage, given by the said N. C. Mickelson and Ruby Mickelson on the 6th day of February, 1911, for said sum of \$12,575.75, was by said makers executed to said plaintiff in payment of, or to secure, a pre-existing debt for goods, wares and merchandise purchased by the said N. C. Mickelson from said plaintiff in the course of carrying on a general mercantile business, which said indebtedness, as this defendant is informed and believes and upon that ground alleges, had existed in the form of an open account for some time previous thereto, and that the execution of said note and mortgage was for the purpose of giving to said plaintiff a preference over and above his other

creditors, and that the same was taken by said plaintiff with the full knowledge on its part that at the time of the execution of said note and mortgage the said N. C. Mickelson was a bankrupt, and on plaintiff's part to secure a preference in the estate of the said N. C. Mickelson, and that by reason thereof the execution of said note and mortgage, as against the several claims herein mentioned, and particularly the claims of P. J. Johnson, D. F. Hagans, the Idaho Lumber Company, Ltd., a corporation, Geo. A. Lowe Company, a corporation, and E. E. Rodgers and F. C. Rodgers in the respective amounts due them on their said several mechanic's liens and said mortgage, as hereinbefore specifically mentioned, was and is null and void, and of no force and effect as against said persons and said claims; that all of said several mechanic's liens and said mortgage are long prior in point of time to plaintiff's said mortgage, and that they are therefore senior, superior and paramount liens upon said premises to plaintiff's said mortgage, and were valid and subsisting liens against said premises long prior to the execution of plaintiff's said mortgage.

PRAYER.

Wherefore, this defendant prays that plaintiff's said mortgage be adjudged and decreed null and void for the reason that the same was given to secure and obtain a preference in the estate of the said N. C. Mickelson, a bankrupt; that in event the court should hold said mortgage as a valid and subsisting lien

against the estate of said N. C. Mickelson that it be adjudged and decreed to be junior and inferior and of no force and effect as against the title and interest of this defendant; that the title to said premises described in subdivision (1) of paragraph eleven be adjudged and decreed free and clear from plaintiff's said claim and demand arising by reason of its said mortgage; that the title thereto be quieted in this defendant, and that as against this defendant and all of the parties represented by it as such trustee, plaintiff take nothing by reason of its said complaint, and that defendant be discharged herefrom with its costs herein incurred, and that the court afford this defendant such further relief in the premises as may be meet and proper.

WILLIAM A. LEE and
JOHN W. JONES,
Attorneys for said Defendant.
Residence: Blackfoot, Idaho.

State of Idaho,
County of Bingham,—ss.

C. V. Fisher, being first duly sworn, upon oath says: That he is an officer of the said defendant, D. W. Standrod & Company, a corporation, to-wit, the Cashier thereof, and that as such officer he makes this verification: That he has read the foregoing answer, and that he believes the facts therein stated to be true.

C. V. FISHER.

Subscribed and sworn to before me this the 22nd day of September, 1913.

(Seal)

C. S. BEEBE,
Notary Public.

(Endorsed): Filed Sept. 24, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C. Rodgers,

Defendants.

*Reply of Plaintiff to Set-off and Counterclaim of
D. W. Standrod & Company, Trustee.*

Comes now the above named plaintiff and for reply to the set-off and counterclaim contained in the answer, filed herein of the defendant, D. W. Standrod & Company, as Trustee, admits, denies and alleges as follows:

I.

The plaintiff admits that liens were filed and the Rodgers mortgage executed and delivered as alleged in paragraph numbered one of the said set-off and

counterclaim and that thereafter and within the time allowed by law said several parties therein mentioned each severally commenced actions to foreclose their respective liens and said mortgage and that thereafter by order of Court said actions were consolidated and proceeded to final judgment, but this plaintiff denies that it was a party to said suits, or any of them and in that behalf this plaintiff alleges that it was not a party to any of said suits and this plaintiff alleges that its said mortgage, described in its complaint herein, was executed, acknowledged and delivered and filed for record in the office of the Recorder of Bingham County, Idaho, prior to the filing of any of said liens and prior to the commencement of any of said actions for the foreclosure of said liens and mortgage.

II.

The plaintiff alleges that the alleged lien of P. J. Johnson set forth and described in paragraphs numbered two, three, four and five of said counterclaim and set-off and any and all right of action for the foreclosure thereof is barred as against this plaintiff for the reason that no action was brought for the foreclosure of same against this plaintiff within two years from the time of the completion of the work for which said lien was claimed, nor within two years after the filing of said lien as required by the provisions of Section 5118 of the Idaho Revised Codes.

III.

The plaintiff alleges that the alleged lien of D. F. Hagans set forth and described in paragraphs numbered six, seven and eight of said counterclaim and set-off and any and all right of action for the foreclosure thereof is barred as against this plaintiff for the reason that no action was brought for the foreclosure of same against this plaintiff within two years from the time of the completion of the work for which said lien was claimed, nor within two years after the filing of said lien as required by the provisions of Section 5118 of the Idaho Revised Codes.

IV.

The plaintiff alleges that the alleged lien of the Idaho Lumber Company, Ltd. set forth and described in paragraphs numbered nine, ten and eleven of said counterclaim and set-off and any and all right of action for the foreclosure thereof is barred as against this plaintiff for the reason that no action was brought for the foreclosure of same against this plaintiff within two years from the time of the completion of the work for which said lien was claimed, nor within two years after the filing of said lien as required by the provisions of Section 5118 of the Idaho Revised Codes.

V.

The plaintiff alleges that the alleged lien of Geo. A. Lowe Company set forth and described in paragraphs numbered twelve, thirteen, fourteen, fifteen and sixteen of said counterclaim and set-off and any

and all right of action for the foreclosure thereof is barred as against this plaintiff for the reason that no action was brought for the foreclosure of same against this plaintiff within two years from the time of the completion of the work for which said lien was claimed, nor within two years after the filing of said lien as required by the provisions of Section 5118 of the Idaho Revised Codes.

VI.

This plaintiff not having sufficient information or belief to enable it to answer the same and placing its denials upon that ground and in order to put the defendant, D. W. Standrod & Company, as Trustee, upon its proof as to any right or lien it may have under said Rodgers mortgage the plaintiff denies that said N. C. Mickelson has not paid said note, nor any part thereof, or any interest thereon, or that N. C. Mickelson failed or neglected to pay the taxes upon said premises for the year 1911 amounting to the sum of Two Hundred Six and 63-100 (\$206.63) Dollars, or that said E. E. Rodgers and F. C. Rodgers, or either of them paid on December 30th, 1911, or at any other time, said or any amount of taxes, or that by reason of N. C. Mickelson's failure to pay said interest and taxes as they became due the principal sum expressed in said note was immediately due, or that the said E. E. Rodgers and F. C. Rodgers, or either of them, elected to or did elect to declare the whole amount secured by said mortgage due and payable, or that at the time of the sale mentioned in said set-off and counterclaim on January

4th, 1912, there was due and unpaid or is now due or unpaid, on said note and mortgage, the sum of Forty-one Hundred Nine and 39-100 (\$4109.39) Dollars or any other sum or amount whatever.

VII.

The plaintiff denies that Three Hundred (\$300.00) Dollars is a reasonable Attorney's fee for the foreclosure of said Rodgers mortgage, or that in the event of foreclosure thereof that any amount greater than One Hundred and Fifty (\$150.00) Dollars is a reasonable Attorney's fee for the foreclosure of said mortgage.

VIII.

As to whether the defendant, D. W. Standrod & Company, at or about the time of the purchase of said premises by it paid the sum of Eighty-four and 04-100 (\$84.04) Dollars as taxes on said premises described in sub-division one, to protect said property from sale, this plaintiff has no information or belief sufficient to enable it to answer and placing its denial upon that ground the plaintiff denies that any such payment was made and further in that behalf this plaintiff alleges that subsequent to the commencement of this action it was stipulated and agreed between the plaintiff and the defendant, D. W. Standrod & Company, as Trustee, in writing that the defendant, D. W. Standrod & Company, as Trustee, was in the possession of the said real estate situate in Shelley, Idaho, described in plaintiff's complaint and receiving the rents and profits there-

of and said defendant agreed with the plaintiff that it would apply the rents received from said property by it to the payment of taxes, which had been or might thereafter be assessed against said property and to the payment of insurance premiums for the insurance on said premises and that it would hold any surplus to abide the order of the Court in this action.

IX.

The plaintiff admits that the said note and mortgage given by N. C. Mickelson and Ruby Mickelson to this plaintiff on February 6th, 1911, for the sum of Twelve Thousand Five Hundred Seventy-five and 75-100 (\$12,575.75) Dollars was by said makers executed to the plaintiff in payment of or to secure a pre-existing debt for goods, wares and merchandise purchased by said N. C. Mickelson from the plaintiff and admits that part of said indebtedness had existed for some time previous thereto in the form of an open account, but denies that all of said indebtedness was in the form of an open account for some time previous thereto and in that behalf alleges that nearly all of said indebtedness was represented by other notes which had been theretofore executed and delivered to the plaintiff by the said N. C. Mickelson.

X.

The plaintiff denies that the execution of said note and mortgage of the plaintiff was for the purpose of giving to the plaintiff a preference over and

above the other creditors of said N. C. Mickelson or that the same was taken by the plaintiff with the full knowledge, or any knowledge, on its part that at the time of the execution of said note and mortgage the said N. C. Mickelson was a Bankrupt, or on the part of the plaintiff to secure a preference in the estate of said N. C. Mickelson, or that by reason thereof the execution of said note and mortgage as against the several claims mentioned in said set-off and counterclaim, or any of them, or particularly the claims of P. J. Johnson, D. F. Hagans, the Idaho Lumber Company, Ltd., a corporation; Geo. A. Lowe Company, a corporation, and E. E. Rodgers and F. C. Rodgers, or any of them, in the respective amounts, or any amounts due to them, or any of them, on their said several mechanic's liens and said mortgage, or any of them, was or is null and void, or null or void or of no force and effect, or of no force or effect as against said persons, or any of them or said claims or any of them, or that said N. C. Mickelson was a bankrupt at the time of the execution of plaintiff's said note and mortgage.

XI.

The plaintiff admits that the said Rodgers mortgage was prior in point of time to plaintiff's said mortgage and that for any amount due or unpaid thereon it is senior, superior and paramount as a lien to plaintiff's mortgage, but the plaintiff denies that all or any of said several mechanic's liens are prior in point of time to plaintiff's said mortgage, or that they, or any of them are senior, superior or

paramount liens upon said premises to plaintiff's said mortgage or that said liens or any of them were valid or subsisting liens against said premises long prior or at all prior to the execution of plaintiff's said mortgage.

XII.

Further answering said set-off and counterclaim this plaintiff alleges that prior to the commencement of this section and subsequent to the appointment and qualifying of the defendant, Frank C. Bowman as Trustee of N. C. Mickelson, a bankrupt, the said Frank C. Bowman, as such Trustee, instituted an action in the District Court of the United States for the District of Idaho, Eastern Division, against this plaintiff wherein said Bowman, as Trustee, sought to set aside the mortgage of the plaintiff, described in its complaint herein, as being a preference in favor of this plaintiff over and above other creditors of the said N. C. Mickelson on the ground that such mortgage was executed and delivered within four months of the adjudication of the said N. C. Mickelson, by said Court, as a Bankrupt and that such mortgage was executed and received with the intention, on the part of the parties to said mortgage of creating a preference in favor of this plaintiff and that the plaintiff knew when it received said mortgage that the effect thereof would be to create a preference. That afterwards a settlement was agreed upon between the parties to said action, in writing, whereby in consideration of Eight Hundred (\$800.00) Dollars paid to said Frank C. Bow-

man, as Trustee, as aforesaid, by this plaintiff, the said Frank C. Bowman, as such Trustee, agreed to dismiss the said suit to set aside plaintiff's said mortgage as a preference and consented to an order in the Bankruptcy proceedings of said Mickelson, a Bankrupt, permitting a suit to be brought by this plaintiff to reform its said mortgage and to foreclose the same and agreed to enter an appearance in such action to be brought by the plaintiff to reform and foreclose its said mortgage and agreed that he would not defend such suit to be brought by the plaintiff to reform and foreclose its said mortgage and afterwards in pursuance of said stipulation the said Frank C. Bowman, as such Trustee, dismissed the said action, which he had theretofore brought to set aside plaintiff's said mortgage as a preference and an order of dismissal thereof was entered by the Court wherein the said action was pending in pursuance of the said stipulation and thereafter the plaintiff instituted this action under the terms of the said stipulation to reform and foreclose its said mortgage.

Wherefore, having fully answered said set-off and counterclaim the plaintiff prays that it may have the relief prayed for in its complaint herein and that the set-off and counterclaim of the defendant may be dismissed with prejudice.

CLENCY ST. CLAIR and
CHARLES C. ST. CLAIR,
Attorneys for Plaintiff,
Residence: Idaho Falls, Idaho.

State of Idaho,
Bonneville County,—ss.

Clency St. Clair being first duly sworn upon his oath says: That he is one of the Attorneys for the plaintiff in the above entitled action; that said plaintiff is a Utah Corporation and that none of its officers are now within the State of Idaho wherein this affiant resides and for the reason this verification is made by this affiant; that he has read the foregoing reply and knows the contents thereof and that he believes the facts therein stated to be true.

CLENCY ST. CLAIR.

Subscribed in my presence and sworn to before me this 23rd day of September, 1913.

(Seal)

J. J. JOHANNESSEN,
Notary Public.

(Endorsed): Filed Sept. 25, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for the Idaho Lumber Company, Ltd.,
George A. Lowe Company, E. E. Rodgers and F.
C. Rodgers,

Defendants.

Supplemental Pleading.

Comes now the above named defendant, D. W. Standrod & Company, and asks leave of court to file this supplemental pleading, and as grounds therefore alleges:

I.

That issue was joined in this cause about the 23rd day of September, 1913, by the filing of plaintiff's reply; that this defendant was then first advised of the facts alleged in the 12th paragraph of said reply, and by reference thereto adopts and alleges the facts as therein stated as fully as if the same were set forth herein *haec verba*.

II.

That on the 26th day of August, 1911, the said Frank C. Bowman, Trustee, above named, commenced an action in this court against the Utah

Implement-Vehicle Company, the above named plaintiff in this action, for the purpose of setting aside and vacating the mortgage sought to be foreclosed in this action, on the ground, and for the reason, that the same was, and is voidable and in conflict with the Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," and particularly Sections 60a and 60b thereof, for that said mortgage had been given by the said N. C. Mickelson for a previous existing indebtedness upon open account for merchandise, when he was a bankrupt, within four months of his having filed a petition in bankruptcy, and been adjudged a bankrupt, for the purpose, and with the intention, of enabling the said Utah Implement-Vehicle Company to obtain a greater percentage of its debts than any other of its creditors of the same class, and the said Utah Implement-Vehicle Company having obtained and taken such mortgage when it had reasonable cause to believe that an enforcement of the same would effect a preference in its favor over other creditors of such bankrupt of the same class, all of which more fully appears from the fact as alleged in said Bill of Complaint filed in said action, the same being hereby referred to, and said facts as therein alleged being made a part hereof.

III.

That subsequently and at great expense to said estate, said trustee caused to be taken in said action the deposition of said N. C. Mickelson, who had, soon

after filing his petition in bankruptcy, removed to Prince Rupert, British America, and he still resides beyond the jurisdiction of the United States; that said deposition is now a part of the records of this court in said cause, and tends to prove the truth of the allegations of said Bill of Complaint; that thereafter and about April, 1913, plaintiff herein, being defendant in said action, paid to said Frank C. Bowman, as Trustee, the sum of \$800.00 in consideration that he, the said Frank C. Bowman, would dismiss said action and agree to enter an appearance in this action, the same not then having been commenced, and would further agree not to defend this suit, as more particularly alleged in the 12th paragraph of the reply herein, and the stipulation made and entered into by said parties, which is hereby adopted and made a part hereof by reference thereto; that this defendant had no knowledge of the dismissal of this action until about the time of the filing of plaintiff's reply herein, and that it is informed, and believes, and alleges the fact to be that the mortgage sought to be foreclosed herein was given for an indebtedness existing upon open account by the said N. C. Mickelson to the said Utah Implement-Vehicle Company, and that an account had been given, which indebtedness had arisen by reason of merchandise furnished by the Utah Implement-Vehicle Company to the said N. C. Mickelson, and which it subsequently reclaimed to the extent of \$4000.00, on the ground that the same was consigned goods, and that said mortgage was therefore \$4000.00 in excess of the

actual indebtedness, owing on said open account by the said N. C. Mickelson to the said Utah Implement-Vehicle Company; that up to about the time said action to set aside said mortgage was dismissed, the Trustee and his counsel had expressed the belief that they would be able to vacate and set aside said mortgage for the reasons alleged in said Bill of Complaint.

IV.

That the action of the said Frank C. Bowman and of this plaintiff in so stipulating and agreeing to dismiss said action brought to vacate and set aside said mortgage, was wrongful and in prejudice of this defendant's rights and proved as a constructive fraud upon it, and for the reasons herein stated, the said Trustee should be required to proceed to final judgment upon the issues of facts presented in said action; that the Utah Implement-Vehicle Company claim and assert in this action that this defendant is without right to defend this said action against it upon the grounds of unlawful preference, or for any reasons alleged herein, because such right and authority exists only on the part of said Trustee in Bankruptcy, and that it having procured said Trustee to dismiss this action for said agreed consideration of \$800.00, that this defendant is without remedy in the premises.

V.

That this defendant refers hereby to said Bill of Complaint filed by said Trustee about August 29,

1911, and the stipulation entered into to dismiss said action in April, 1912, and the said deposition taken at Prince Rupert, and all of the files and records of that action, and the same are hereby made a part of this Supplemental Pleading, and are set forth as grounds for the relief herein prayed for.

Wherefore, this defendant prays that said stipulation and agreement between said Trustee and the plaintiff herein, whereby it was agreed that this plaintiff should pay to said Trustee the sum of \$800.00 to dismiss said action, and to have said Trustee further agree that he would not defend this action, be set aside and vacated, and that the order permitting such dismissal be set aside and vacated; that this Court direct said Trustee to prosecute said action to final judgment, or in the event that he does not prosecute said action further, that this defendant be permitted to do so, and that pending the determination of said issues, the proceedings to foreclose plaintiff's mortgage in this action be stayed and held in abeyance; that this defendant be permitted to offer all of the records and files, including the deposition of the said N. C. Mickelson, in support of the action to vacate and set aside said mortgage, in so far as the same may be material and relevant to said issues.

WILLIAM A. LEE,
Attorneys for defendant, D. W. Standrod & Company.

State of Idaho,
County of Bingham,—ss.

William A. Lee, being first duly sworn, on oath deposes and says: That he has read the foregoing Supplemental Pleading; that he knows the facts therein alleged, and that said facts as stated in said Pleading are true, as he verily believes.

That he has mailed copies of the foregoing Pleading to St. Clair & St. Clair, Attorneys for plaintiff, and O. E. McCutcheon, Attorney for the Trustee, postage prepaid, to Idaho Falls, Idaho.

WILLIAM A. LEE.

Subscribed and sworn to before me this the 18th day of October, 1913.

(Seal)

C. S. BEEBE,
Notary Public.

(Endorsed): Filed Oct. 20, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

VS.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
Ltd., GEO. A. LOWE COMPANY, E. E. ROD-
GERS and F. C. RODGERS,

Defendants.

*Supplemental Pleading on Behalf of Frank C. Bow-
man, Trustee.*

This matter having come on to be heard informally in open court on the 15th day of October, 1913, at Pocatello, Idaho, on the application of D. W. Standrod & Company, Trustee, presented by W. A. Lee, attorney for said D. W. Standrod & Company; by leave of the court and with the consent of all parties, in open court, the said Frank C. Bowman, Trustee, by O. E. McCutcheon, his attorney, made a statement of facts to be considered as in the nature of a supplemental pleading and, it being further understood that after the said W. A. Lee as attorney for the said D. W. Standrod & Company should file and serve his supplemental pleading and the same to be considered as of this date, to-wit, October 15th, 1913, that the said O. E. McCutcheon as attorney for the said Frank C. Bowman, Trustee, should prepare and file a supplemental pleading covering the matters

undertaken to have been so stated by him orally in open court as aforesaid, and in that behalf comes now the said Frank C. Bowman, Trustee, and files this his supplemental pleading, that is to say:

I.

The said Frank C. Bowman, Trustee, admits the allegations in paragraph I of the supplemental pleading of the said D. W. Standrod & Company.

II.

Answering paragraph II of the said last mentioned supplemental pleading, said defendant Frank C. Bowman, Trustee, admits the commencement on August 26th, 1911, of the action in this court for the purpose of setting aside the mortgage mentioned running to the plaintiff herein on the ground that the same was an unlawful preference and in violation of the Act of Congress mentioned in said paragraph II.

III.

Defendant admits the taking of the testimony of N. C. Mickelson at Prince Rupert, British Columbia, in substance as alleged in paragraph three of the last mentioned supplemental pleading and that the deposition of said N. C. Mickelson is on file in this court, but as to whether the said deposition tends to prove the truth of the allegations in the Bill of Complaint of this defendant in the suit to set aside said mortgage as above mentioned, this defendant submits that the same is a question of law and on that

point, therefore, makes no answer; this defendant admits that in April, 1913, the plaintiff herein paid the said Frank C. Bowman, as Trustee, the sum of Eight Hundred (\$800.00) Dollars, but denies that the same was alone in consideration that this defendant would dismiss his said action to set aside said mortgage as aforesaid, but was in consideration of the settlement of all matters of difference between the said Frank C. Bowman as Trustee and this plaintiff, and that said matters in difference included the suit to set aside the mortgage as aforesaid and the facts in relation to certain goods alleged to have been consigned by the said plaintiff to N. C. Mickelson & Company mentioned in said paragraph three and in respect to which this defendant in this pleading makes a statement of the facts of said settlement and denies the allegations in said paragraph three and each and every of the same which are inconsistent with the said statement of facts herein contained.

IV.

This defendant denies that the settlement so made between him and this plaintiff whereby the said action to vacate and set aside said mortgage was dismissed was wrongful or that the same was in prejudice of the rights of said D. W. Standrod & Company or of any other party herein and as to all other allegations in paragraph four of said last mentioned supplemental pleading this defendant is advised that they are propositions of law and, therefore, this defendant makes no further answer thereto.

V.

This defendant joins in the reference to other pleadings and papers in this court relating to the subject matter hereof.

VI.

Answering with particular reference to the statements in paragraph three of the said supplemental pleading of the said D. W. Standrod & Company, Trustee, and making a statement of the facts in relation to the same, this defendant states and alleges as follows:

That at the time, to-wit, February 6, 1911, when the said N. C. Mickelson, who afterwards became bankrupt, gave the mortgage to the plaintiff herein, that all the mortgaged real estate covered by said mortgage was encumbered by prior mortgages which with interest and costs, both accrued and prospective, should be expected to amount to over Five Thousand (\$5,000) Dollars, which said prior mortgages have never been contested or challenged.

That the principal item of real estate mentioned in said mortgages was a certain building lot with the building thereon situated in the Village of Shelley, which building was constructed within the year previous to the bankruptcy of said Mickelson and that at or about the time of the said Mickelson becoming a bankrupt lien claims had been filed against said lots and building by the parties mentioned in the files and records hereinbefore referred to and also by Crane Company, a corporation.

That at the time, to-wit, August 26th, 1911, when this defendant began his suit to set aside as an unlawful preference the mortgage so given to the plaintiff, no suit had been commenced to determine and satisfy such lien claims except on behalf of the said Crane Company, which was commenced April 8, 1911, and afterwards ripened into a judgment of over Thirteen Hundred (\$1300) Dollars.

That the said Mickelson, at the time of his bankruptcy, resided at Shelley aforesaid and that shortly after his adjudication of bankruptcy he left his said home and went to the Dominion of Canada and resided for a short time in Calgary and other points before removing to Prince Rupert.

That this defendant procured certain communications to be made with the said Mickelson after his departure from Shelley as aforesaid, and that the nature of such communications led this defendant to believe that on a trial of an issue of whether the mortgage so given to the plaintiff was an unlawful preference the said Mickelson would testify favorably to this defendant.

That thereafter, and during the winter of 1911 and 1912 arrangements were made by stipulation for taking the testimony of said Mickelson in Prince Rupert to which point he had then removed and that said testimony was in fact taken on or about the 27th day of March, 1912, there being present to assist in the taking thereof the manager of the plaintiff and Mr. Erwin, its attorney from Salt Lake and the attorney for this defendant; that the testimony of

said Mickelson was a disappointment to this defendant and both this defendant and his attorney afterwards considered that the successful outcome of the said suit to declare the plaintiff's mortgage an unlawful preference was doubtful and deny that they ever expressed any different opinion at any time after the taking of said testimony.

That on account of the absence of this defendant's attorney during the spring and summer of 1912 there was no opportunity for a full consultation in reference to the further conduct of his said suit until about the middle of September, 1912.

That at that time the said lien claims had ripened into judgments; that neither of said lien claimants nor the owners or holders of any of the prior mortgages above mentioned nor the plaintiff in this suit had filed claims as general creditors of said bankrupt.

That in the judgment of this defendant the said liens and prior mortgages would substantially absorb and use up the mortgaged assets and that the condition of the said bankrupt's estate was such that in substance it could not even, if thought advisable, redeem the mortgaged property from the prior incumbrances and that in this state of the case the only way reasonably practicable by which this defendant could reap any benefit from the circumstances for the general creditors of the bankrupt estate would be by means of the claim which this defendant asserted against the plaintiff in relation to the consigned goods, so called, and concerning which

a statement appears in paragraph three of the said supplemental pleading of said D. W. Standrod & Company and in respect to said consigned goods the position taken by this defendant was as follows:

(1). That the purchase price of the same or a portion thereof was included within the plaintiff's said mortgage and if this claim were established that it would amount to a waiver of the claim of plaintiff to the title to so much of said consigned goods the price of which was so included in the consideration of said mortgage.

(2). That if the inclusion of the price of such or any of said consigned goods in the consideration of the plaintiff's mortgage could not be held to be a waiver of plaintiff's claim of title thereto, nevertheless, by taking and appropriating the same there had been paid a portion of said mortgage and that the plaintiff either should reduce the amount of its mortgage or pay to this defendant the price of such consigned goods in so far as the purchase price thereof was included in the consideration of said mortgage.

This defendant, under advice of his said counsel, concluded to abandon the effort to have the plaintiff's mortgage declared an unlawful preference provided he could make a settlement in relation to said consigned goods.

Negotiations were thereupon opened between this defendant and the plaintiff for a settlement and it was arranged that the defendant should have access to the books of the plaintiff for the purpose of de-

termining how much if any of said consigned goods were included in the mortgage as aforesaid, whereupon this defendant went to Salt Lake and examined the books of the plaintiff and reported to his counsel, as his opinion, that about Twenty-eight Hundred (\$2800) Dollars of the price of said consigned goods was included within the consideration of the plaintiff's said mortgage. This conclusion was strenuously denied and opposed by the plaintiff, who insisted that none or at least no substantial part of the purchase price of said consigned goods were so included within the consideration of its said mortgage.

The negotiations above set forth occupied such time that the case could not be tried in the October term of 1912 and by consent was continued over to the April term of 1913, at which time no settlement or understanding having been reached, the case was upon the calendar of the said April term, 1913, for trial and the counsel for the respective parties being present at Pocatello on the day of the opening of the court, negotiations for a settlement were renewed and resulted in an agreement by this defendant to dismiss the suit, to have the plaintiff's mortgage declared an unlawful preference and to settle the outstanding claims in relation to the said consigned goods by the payment by the plaintiff to this defendant of Eight Hundred (\$800) Dollars.

The terms of said proposed settlement were orally reported to the court counsel for both parties being present whereupon the Court announced that inas-

much as this defendant and his counsel believed such settlement would be for the best interests of the bankrupt's estate the same would be approved when the proper papers were made and filed.

This defendant states further as his opinion, basing the same upon his knowledge and judgment of the transactions, that he made the best settlement that it was possible to be obtained and that as to the claim that the same was fraudulent as to the said D. W. Standrod & Company, Trustee, this defendant states that in his opinion at the time and now the mortgage to the plaintiff was based upon a full consideration as stated in said mortgage and continued as between the parties thereto a bona fide security for its full consideration as stated therein except as the same should be reduced by reason of the price and value of the whole or a portion of such consigned goods. That the further prosecution of said suit to have said mortgage declared an unlawful preference in view of all the circumstances amounted, in substance, to putting the general estate of said bankrupt to expense for the purpose of determining priorities between creditors having apparent security for their several claims and none of which creditors had filed any claims or were in any manner general creditors of the said estate; that the said estate had no substantial interest in the subject matter or in the question of priorities between secured creditors who were not general creditors and therefore it was just and equitable for this defendant to withdraw such suit and not to prosecute it further

and to leave the priorities between such secured creditors to be determined in proceedings to be brought by themselves for that purpose.

O. E. M'CUTCHEON,
Attorney for Frank C. Bowman, Trustee.

State of Idaho,
County of Bonneville,—ss.

O. E. McCutcheon being duly sworn deposes and says: That he has read the foregoing supplemental pleading, that he has a more intimate knowledge of the facts therein stated than the said Trustee and, therefore, verifies the same on his behalf, and that affiant believes the facts stated in said pleading to be true.

O. E. M'CUTCHEON.

Subscribed and sworn to before me this 25th day of October, 1913.

(Seal)

OTTO E. M'CUTCHEON,
Notary Public.

(Endorsed): Filed Oct. 27, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy of
the Estate of N. C. Mickelson, a Bankrupt, and D.
W. STANDROD & COMPANY, a Corporation,
as Trustee for the Idaho Lumber Company, Ltd.,
George A. Lowe Company, E. E. Rodgers and F.
C. Rodgers,

Defendant.

Order.

On this the 15th day of October, 1913 this cause being heard in open court upon the defendant's, D. W. Standrod & Company's, Supplemental Pleading, the same being tendered for filing by William A. Lee, Esq., its attorney, and the court, being fully advised in the premises, hereby denies the relief prayed for in said Pleading, but upon counsel's request for further time to redraft the same, and eliminate errors, and serve copies upon plaintiff's counsel and upon counsel for the Trustee, it is ordered that he may do so, and verify the same, and that it may be filed and considered as a part of the records in this cause as of this date, and that exceptions may be allowed defendant upon the court's denial of the relief so prayed for.

Done in open court as of the 15th day of October,
1913.

FRANK S. DIETRICH,
Judge.

(Endorsed): Filed Oct. 15, 1913. A. L. Richardson,
Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Decision.

NOVEMBER 18, 1913.

ST. CLAIR & ST. CLAIR,

Attorneys for Plaintiff.

O. E. M'CUTCHEON,

Attorney for defendant Bowman.

WILLIAM A. LEE and JOHN W. JONES,
Attorneys for defendant D. W. Standrod & Company.

DIETRICH, District Judge:

A very brief statement of the facts will suffice to make clear the nature of the single question which has been argued and submitted for decision. The suit is brought to foreclose a mortgage given to the plaintiff by N. C. Mickelson on the 6th day of February, 1911, to secure the payment of a promissory note of the same date for \$12,575.75, which mortgage was, on February 21, 1911, recorded in the office of the County Recorder of Bingham County, Idaho, where the property is situate. Mickelson later became a bankrupt, and his Trustee is made a party defendant. The other defendant, D. W. Standrod & Company, a corporation, is the Trustee for the Idaho Lumber Company and others, who claim liens upon or equitable interests in the mortgaged property. It is unnecessary to explain the nature of this trust further than to say that the interests of all beneficiaries thereof save one originated in mechanics' liens for services rendered and materials furnished in the construction of a building upon a portion of the mortgaged premises. The original validity of these liens is not now called into question, and for the purposes of the decision it is assumed that in due time the several parties filed their claims of lien in the form prescribed by law, and that within the statutory period they commenced proceedings in the proper state district court to enforce the liens, and that such suits were consolidated, and later a decree was entered adjudging the several claims to be liens upon the property of the mortgagor, and that thereafter the property was duly

sold to satisfy the amounts adjudged to be due, at which sale Standrod & Company became the purchaser, as Trustee for all concerned. It is further assumed that while some of these claims were filed with the Recorder shortly before and some shortly after the execution and recording of the plaintiff's mortgage, by relation the liens may have all antedated the lien of the mortgage. Although its mortgage was of public record when they were commenced, the mortgagee, the plaintiff here, was not made a party to the lien suits, and its contention now is that therefore not only is it not bound by such foreclosure proceedings, but also that through lapse of time the liens have been lost, and as to it they are no longer of any validity. The precise question, therefore, is, whether or not a lien claimant under the mechanics' lien law of Idaho loses his priority of lien as against a junior mortgagee, by foreclosing his lien without bringing in and making a party to such foreclosure suit the mortgagee, the period provided by the statute in which proceedings may be commenced for the enforcement of the lien, expiring during the pendency of the suit.

A mechanic's lien is wholly the creature of statute, and therefore the question must be referred to the statutory law of the state. In construing such statutes two principles are to be borne in mind: Upon the one hand, they are to be construed liberally, with a view to effecting their object and doing substantial justice, and, upon the other hand, we must take them as we find them, and we are not at liberty to add to

or subtract therefrom. The question of policy is one exclusively for the Legislature, and it is our function only to ascertain, if possible, the intent of the statutes, and then administer them in such a manner as to give effect thereto.

Section 5110 of the Idaho Revised Codes provides generally that every person performing labor upon, or furnishing materials to be used in, the construction of a building, has a lien upon the same for the work done or materials furnished. Section 5114 provides that such liens are preferred to other incumbrances attaching subsequent to the time when the building was commenced or the work done or materials furnished. Section 5115 requires that any person claiming a lien shall, within the period therein prescribed, file his verified claim therefor, containing certain statements of fact, in the office of the County Recorder of the county in which the property is situated. Section 5118 is as follows: "No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced." Section 5124 provides that the general rules of civil procedure prescribed by

the codes shall apply in proceedings to foreclosure liens. No other provisions are thought to have any material relation to the question under consideration, and it is apparent that, of those referred to, Section 5118, which is set out in full, is of primary importance. Admittedly, if no action at all is commenced within the period therein named, the lien lapses and absolutely ceases to exist as to all the world. The contention of the defendant, however, is that, under this section, "proceedings" are "commenced" when a suit to foreclose the lien is brought by the lienor against the owner of the property upon which the lien is claimed. The reasoning is that, in a suit of foreclosure of a mortgage or of a mechanic's lien, the owner of the title to the property is the only indispensable party, and that while others may be proper parties, their presence is not essential to the validity of the decree which may be entered therein. It is doubtless true that the owner of the property is the only indispensable party to such suit, and in a case where he is the sole defendant the decree is not void; it is effective to the extent of cutting off his rights and estate, and doubtless a deed issued to a purchaser upon a proper sale had under the provisions of such decree operates to transfer his title to the purchaser. But, upon the other hand, it is also undoubtedly the case that incumbrancers who are not made parties to such suit are in no wise affected by the decree, and their liens remain unimpaired. If not entirely aside from the point, therefore, it is certainly not conclusive of the question under con-

sideration to say that the decree entered in the consolidated case in the state court, foreclosing the liens of the several claimants, is valid. Likewise a decree would be valid if the suit were prosecuted against but one of several part owners of the property; but in such case what would be the status of the lien as touching the interests of the other part owners? So the plaintiff here, conceding that the decree in the former suit is conclusive upon the parties thereto, contends only that it is in no wise bound thereby, and that, the time having long since elapsed for foreclosing the liens against it, they have therefore ceased to exist, so far as its interest is concerned. And it must be conceded that its rights were not, and could not be, affected by a suit to which it was not a party. The record in that case cannot operate even as *prima facie* evidence against it. If it were assumed that the lien claimants are not prejudiced by the lapse of time, they could not now bring forward the decree as the measure or evidence of their rights, but as against the plaintiff they would be compelled to make proof *de novo* in support of their claims, the same as if such decree had never been entered. *Hassall v. Wilcox*, 150 U. S. 493. In that view it follows that no proceedings were ever commenced to enforce the liens against the interest of this plaintiff.

The real question, therefore, is, whether or not the commencement of a proceeding against one party in interest operates to keep alive the lien as to all parties in interest. It will be observed that Section 5118 does not purport in terms to prescribe who shall be

made parties to the suit, either plaintiff or defendant, and in giving to it a practical construction it is necessary to interpolate a designation or description of the parties. Defendant would make the clause, "unless proceedings be commenced in a proper court, etc.", read, "unless proceedings be commenced in a proper court *against the owner of the property*, etc.", whereas the plaintiff would have it read, "unless proceedings be commenced in a proper court *against the person or persons against whose interests the lien is asserted, etc.*" After the most earnest consideration, I cannot escape the conclusion that this latter view is in substantial accord with the true intent of the legislature. No lien, it is provided, shall bind the property for a period of more than six months, "unless proceedings be commenced in a proper court within that time to enforce such lien." But proceedings to enforce the lien against what and against whom? The natural answer is, the lien against the right or interest of anyone against whose right or interest the lien is claimed or asserted. The proceeding is one to foreclose a right, an estate, an interest, and it should be instituted against all those whose rights, estates or interests are claimed to be subordinate, and which may therefore be subject to foreclosure. Surely it is not sufficient merely to bring in such parties as will enable the plaintiff to procure some sort of valid decree. As already suggested, a suit by the claimant against one of several co-owners of the property might result in a valid decree; it

would establish the lien as against the estate of such defendant, and the ensuing sale would effectually foreclose his right. But by no one, as I understand, is it contended that such a proceeding would operate to keep alive the lien upon the interests of other part owners. If, then, such an interest remains unaffected thereby, why should an exception be made in the case of a mortgagee or the holder of an estate or interest of a different character? The proceeding is to be commenced to enforce the lien, not against a single specified estate or interest, but against any estate, interest, or right which the lienor claims to be adverse and subordinate to his lien, and therefore subject to foreclosure, and the privilege of commencing a proceeding for such a purpose, that is, for any foreclosure, or the foreclosure of any right or interest, is, as to such right, interest, or estate, limited to the specified period.

If now we turn from an analysis of the text to a consideration of the reasons for enacting the provision and the objects to be affected thereby, we are impelled to the same conclusion. We must assume that the legislature acted neither arbitrarily nor capriciously, but upon the other hand the reasons must have seemed to it cogent for requiring suit to be commenced in so short a time. Manifestly, the principal, if not the only, purpose of such a limitation could have been to require that the amount and dignity of the lien be judicially ascertained and established while the transaction out of which it arises is sufficiently recent to render the facts reasonably acces-

sible to all parties concerned. Any dispute touching the amount of the claim, the date of its origin, or the time to which the lien relates, is thus to be conclusively settled while the facts are still fresh and the witnesses are available. Now it cannot be doubted that it is often quite as important, if not more important, to an incumbrancer who is a stranger to the transactions upon which the claim of lien is based, to have the benefit of this protection as to the owner himself, who is in a better position to know the facts and to preserve the evidence thereof. Disputes not infrequently arise between mortgagees and lien claimants touching the priority of their respective liens, and inasmuch as the facts establishing the date as of which the mechanic's lien attaches, often rest entirely in parol, and can therefore easily be colored or perverted, it is important that the issue be promptly determined. If we give place to the view urged by the defendant it could very well happen that after the lapse of years a mortgagor would for the first time learn or have reason to suspect that a title originating in the foreclosure of a mechanic's lien was claimed to be superior to the lien of his mortgage. Not having been made party to the suit, his natural presumption would be that the priority of his mortgage is conceded, and there would be nothing in the transfer of title or change of possession to put him upon his guard.

The argument that the limitation does not apply to a mortgage, because the validity and amount of a mechanic's lien may be established in a suit be-

tween the claimant and the owner of the property alone, and that the only issue in which the mortgagee is interested, namely, the date or relative dignity of the lien, may be tried out in a subsequent suit to redeem, insofar as it has any force at all, rests upon an erroneous assumption, which is, that the mortgagee has no right to question the amount or validity of the claim of lien. These are issues which the incumbrancer equally with the owner may raise, and for that purpose the mortgagee is entitled to his day in court. If, for instance, a lien were asserted for the value of material which was never furnished for use in a structure covered by the mortgage, it must be clear that the mortgagee may, by showing the fact, defeat the lien or reduce the amount thereof. As was pertinently said in *Davis v. Bartz*, 118 Pac. 334: "A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority, if the evidence warrants either defense. He is entitled to his day in court upon these matters within the period fixed by the statute." See also *Hassall v. Wilcox*, 130 U. S. 493; *Davis v. Alvord*, 93 U. S. 545; *Brown v. Cornwell*, (Va.), 60 S. E. 623; *Eastmore v. Brinkler*, 113 Ga. 637, 39 S. E. 105; *Adams v. Central City Granite Co.*, 154 Mich. 448, 117 N. W. 932; *Federal Trust Co. v. Guigues*, 76 N. J. Eq. 495, 74 Atl. 652.

Without prolonging the discussion, it is to be added only that upon the principal question the decided cases are not entirely in unison. Of those cited for the defendant, *De La Vergue Refrigerating Co. v.*

Montgomery Brewing Co., 57 Fed. 111, and *Monk v. Exposition, Etc. Co.*, (Va.), 68 S. E. 280, it may be conceded, strongly tend to support its position. In *Cornell v. Cornine-Eaton Lumber Co.*, (Colo.) 47 Pac. 912, it is made clear that the conclusion reached was the result largely, if not entirely, of the emphasis placed upon a provision of the statute not found in the Idaho law. In the others, namely, *Whitney v. Higgins*, 10 Cal. 547, *Gamble v. Voll*, 15 Cal. 507, and *Gaines v. Childers*, (Ore.), 63 Pac. 487, while certain language is used favorable to the defense, the precise question was not involved, and they are, to say the least, not directly in point. Furthermore, it is to be added, the construction which the defendant places upon the two California cases, seems to be out of harmony with the more recent decision in *Frates v. Sears*, (144 Cal. 246, 77 Pac. 905), where the court cites with apparent approval, *Falconer v. Cochran*, (68 Minn. 405, 71 N. W. 386), which unquestionably supports the plaintiff's contention here.

Upon the other hand, it is thought that the conclusion we have reached has the unequivocal sanction of the following cases: *Davis v. Bartz*, (Wash.), 118 Pac. 334; *Deming-Colburn, &c. v. Union Nat'l &c.*, (Ind.), 51 N. E. 936; *Union Nat'l &c. v. Helberg*, (Ind.), 51 N. E. 916; *Stoermer v. People's Savings Bank*, (Ind.), 52 N. E. 606; *Green v. Sanford*, (Neb.), 51 N. W. 967; *Ballard v. Thompson*, (Neb.), 58 N. W. 1133; *Smith v. Hurd*, (Minn.), 52 N. W. 922; *Hakanson v. Gunderson*, (Minn.), 56 N. W.

172; *Falconer v. Cochran*, (Minn.), 71 N. W. 386; *Dunphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, 86 Ill. 437; *McGraw v. Bayard*, 96 Ill. 146; *Jacks v. Sullivan*, (Mo.), 30 S. W. 890; *Badger L. Co. v. Staley*, (Mo.), 125 S. W. 779. I refrain from collocating other cases, cited as indirectly tending to the same result.

There is, as I understand, no controversy over the amount due upon the Rodgers mortgage, including principal, interest, taxes paid, and attorney's fees, the last item being, according to agreement, \$300.00. Nor is there any controversy as to the amount of principal and interest due upon the plaintiff's mortgage. No evidence was introduced touching the amount of attorney's fees to be allowed plaintiff, but in the complaint it is alleged that \$1200.00 is a reasonable fee, and in the answer it is denied that anything in excess of \$800.00 would be reasonable, and at the hearing counsel for the plaintiff stated that they would not contend for an amount in excess of \$800.00. Assuming, therefore, that the services of counsel rendered in, and in connection with, the suit, are of the reasonable value of \$800.00, for which the plaintiff is liable to its attorneys, it appears that part of these services have to do with the reformation of the mortgage, which contained an erroneous description, and the other part with the foreclosure strictly speaking. It is apparent, I think, that the plaintiff cannot recover attorney's fees expended for the purpose of reforming the mortgage. I have

therefore concluded to allow \$600.00 for the services in connection with the foreclosure.

Counsel for the plaintiff are directed to prepare decree and to submit the same to opposing counsel before sending it to me for signature.

(Endorsed): Filed Nov. 18, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C. Rodgers,

Defendants.

Decree.

This cause having come on to be heard at the October term on the 15th day of October, 1913, and the proofs of the respective parties being made and the said cause having been argued by counsel and by the Court taken under advisement, thereupon upon consideration thereof, it is ordered, adjudged and decreed as follows:

That there is due to the defendant, D. W. Standrod & Company, a corporation, as Trustee for Idaho Lumber Company, Ltd., Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, upon the indebtedness secured by the mortgage in favor of E. E. Rodgers and F. C. Rodgers, the sum of Three Thousand (\$3,000.00) Dollars principal, together with interest thereon at the rate of ten per cent per annum from November 29th, 1910, up to the date of this decree and the sum of Two Hundred Ninety and 67-100 (\$290.67) Dollars for taxes paid under said mortgage, together with interest on Two Hundred Six and 63-100 (\$206.63) Dollars thereof at the rate of ten per cent. per annum from December 30th, 1911, and interest on Eighty-four and 4-100 (\$84.04) Dollars thereof at the rate of ten per cent. per annum from the 4th day of January, 1913, up to the date of this decree; also interest upon said amounts and upon the interest thereon up to the date of this decree at the rate of seven per cent. per annum after the date of this decree; also the further sum of Three Hundred (\$300.00) Dollars attorney's fees with interest thereon from the date of this decree at the rate of seven per cent. per annum and that for the said amounts the said defendant, D. W. Standrod & Company, as Trustee, as aforesaid, is entitled to and is hereby decreed and awarded a first lien upon the following described real property, to-wit:

Beginning at the northwest corner of lots one (1) and two (2) of block eighteen (18) of the Townsite of Shelley, Bingham county, Idaho; thence east sev-

enty-five (75) feet; thence south one hundred and thirty-two (132) feet; thence west to the east boundary line of the O. S. L. Ry. right of way; thence northeast along said right of way to the place of beginning, together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

It is further considered, adjudged and decreed that the mortgage to the complainant described in its complaint herein, be and the same is hereby reformed so that the description therein contained and the property thereby mortgaged shall and does read as follows, to-wit:

Beginning at the northwest corner of lots one (1) and two (2) of block eighteen (18) of the Townsite of Shelley, Bingham county, Idaho; thence east seventy-five (75) feet; thence south one hundred thirty-two (132) feet; thence west to the east boundary line of the O. S. L. Ry. right of way; thence northeast along said railroad right of way to the place of beginning. Also the south half of the southwest quarter ($S1\frac{1}{2}$ $SW\frac{1}{4}$) and the northwest quarter of the southwest quarter ($NW\frac{1}{4}$ $SW\frac{1}{4}$) of Section thirty-four (34) in Township one (1) north of Range thirty-seven (37) east of B. M., together with all the improvements, privileges and appurtenances thereunto belonging.

It is further considered, adjudged and decreed that there is due to the complainant upon its said mortgage the sum of Twelve Thousand Five Hun-

dred Seventy-five and 75-100 (\$12,575.75) Dollars, together with interest thereon at the rate of eight per cent. per annum from February 6th, 1911, until February 6th, 1912, and at the rate of twelve per cent. per annum after February 6th, 1912, up to the date of this decree and together with interest upon said principal sum and the interest due thereon at the date of this decree, at the rate of seven per cent. per annum from the date of this decree and the further sum of Six Hundred (\$600.00) Dollars attorney's fees with interest thereon from the date of this decree at the rate of seven per cent. per annum and that for said amounts the complainant is awarded and decreed a lien upon all of the real estate hereby described, covered by its mortgage as reformed hereby, subject only to the first lien hereby awarded to the defendant, D. W. Standrod & Company, as Trustee, as aforesaid, upon the portion of the said real estate covered by the said Rodgers mortgage and situate in the village of Shelley, Bingham county, Idaho.

It is further considered, adjudged and decreed that unless the defendant, Frank C. Bowman, as Trustee of the estate of N. C. Mickelson, a bankrupt, shall, within thirty days from the date of this decree, pay to the complainant and to the defendant, D. W. Standrod & Company, as Trustee, as aforesaid, respectively, the aforesaid sums of money, that the properties hereinbefore described be sold by H. J. Hasbrouck, Special Master, for the satisfaction of the respective liens hereinbefore set forth in their

order of priority as hereinbefore fixed and the said H. J. Hasbrouck is hereby appointed Special Master Commissioner for the purpose of carrying out the directions of this decree, and of selling the said property in accordance therewith and according to the practice of this Court and the statutes of the United States in such cases made and provided.

It is further considered, adjudged and decreed that the said sale shall be at public auction to the highest bidder for cash and that the real property, situate in the village of Shelley, Idaho, shall be offered and sold as one entire tract and that the said real estate, situate in said Section thirty-four (34), Township and Range aforesaid, shall be sold as one entire tract and that the said Special Master Commissioner shall give to the purchaser or purchasers at said sale a certificate or certificates of sale, evidencing the right of the said purchaser or purchasers acquired by the said sale.

It is further considered, adjudged and decreed that the defendants, and all persons claiming under them, or either of them shall be barred and foreclosed by the said sale of all right and equity in said property and the whole thereof, except the statutory right of redemption, and that the purchaser of the said property situate in the village of Shelley, Idaho, shall take such title thereto as was had by N. C. Mickelson, a bankrupt, or by the defendants, or either of them, on the 29th day of November, 1910, together with all title by them since acquired, and that the purchaser

of the said property in said Section thirty-four (34), Township and Range aforesaid, shall take such title thereto as was had by N. C. Mickelson, or the defendant, Frank C. Bowman, as Trustee of the estate of N. C. Mickelson, a bankrupt, on the 6th day of February, 1911, together with all title thereafter acquired by them.

It is further considered, adjudged and decreed that a certified copy of this decree shall constitute the authority of the said Special Master Commissioner to carry out the directions herein contained.

FRANK S. DIETRICH,

Judge.

Dated December 2, 1913.

Received copy of the above form of proposed decree this 21st day of Nov. 1913. No suggestions to offer as to form of same.

WILLIAM A. LEE,

Attorney for D. W. Standrod & Co., as Trustee for Idaho Lumber Co. and Geo. A. Lowe & Co.

Received copy of above proposed decree and the same is satisfactory to me.

O. E. McCUTCHEON,

Attorney for Bowman, Receiver.

(Endorsed): Filed Dec. 2, 1913. A. L. Richardson, Clerk.

REPORT OF SPECIAL MASTER COMMISSIONER.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Complainant,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C. Rodgers,

Defendants.

United States of America,
District of Idaho,
Eastern Division,
Bingham County,—ss.

I, H. J. Hasbrouck, Special Master Commissioner under and by virtue of the decree rendered and entered in the above entitled action, a certified copy of which was issued to me by the Clerk of said Court and which is hereto attached, do hereby certify that I received the said certified copy of decree on the 23rd day of January, 1914, and that pursuant thereto I advertised all and singular the said property and premises described in said decree and hereinafter described for sale at public sale for cash in hand, lawful money of the United States at the front door of

the County Court House at Blackfoot in Bingham county, Idaho, on the 2nd day of March, 1914, at the hour of two o'clock P. M., of said day by causing a notice of said sale to be published for four successive weeks (being five consecutive issues thereof) immediately prior to and preceding said sale, in *The Idaho Republican*, a weekly newspaper selected by me and being a newspaper printed, regularly issued and having a general circulation in the county and State where the said real estate is situated, which said notice correctly described the said properties to be sold and correctly stated and designated the time and place where the said sale would be held. A copy of said notice, as printed and published in said newspaper, together with the affidavit of the publisher of said newspaper thereto attached showing the publication thereof, as hereinbefore stated being hereto attached and filed herewith.

And I further certify that on the said 2nd day of March, 1914, at two o'clock P. M., the day and hour on which the said premises were so advertised to be sold, as aforesaid, I, as such Special Master Commissioner attended at the time and place fixed for said sale and exposed said property and premises for sale at public sale to the highest bidder at public auction as directed by said decree and according to the rules and practices of said Court, and the said property situate in the town of Shelley, Bingham county, Idaho, and described as follows, to-wit:

Beginning at the northwest corner of lots one (1) and two (2) of block eighteen (18) of the Townsite

of Shelley, Bingham county, Idaho; thence east seventy-five (75) feet; thence south one hundred and thirty-two (132) feet; thence west to the east boundary line of the O. S. L. Ry. right of way; thence northeast along said right of way to the place of beginning, together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining,

was then and there by me, as such Special Master Commissioner, fairly struck off to Utah Implement-Vehicle Company, a corporation, being the complainant in said action at and for the sum of Eight Thousand and no-100 Dollars, the said purchaser being the highest bidder therefor and that being the highest and best sum bidden for the same and no one being willing or offering to bid on any portion of the said tract less than the entire parcel; and the said property and premises situate in Bingham county, Idaho, and described as follows, to-wit:

The south half of the southwest quarter ($S1\frac{1}{2}$ SW $\frac{1}{4}$) and the northwest quarter of the southwest quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$) of Section thirty-four (34) in Township one (1) north of Range thirty-seven (37) east of B. M. in Bingham county, Idaho, together with all the improvements, privileges and appurtenances thereunto belonging,

was then and there by me, as such Special Master Commissioner, fairly struck off to Utah Implement-Vehicle Company, a corporation, being the complainant in said action, at and for the sum of Three Thousand and no-100 (\$3,000.00) Dollars, the said pur-

chaser being the highest bidder therefor and that being the highest and best sum bidden for the same and no one being willing or offering to bid on any portion of the said tract less than the entire parcel.

I do further certify that I sold at said sale to the said purchaser all the right, title and interest in and to the tract first above described had by N. C. Mickelson, a bankrupt, or by the defendants in said action, or either of them, on the 29th day of November, 1910, together with all title by them since acquired and all right, title and interest in and to the tract last above described had by N. C. Mickelson, or the defendant, Frank C. Bowman, as Trustee of the estate of N. C. Mickelson, a bankrupt, on the 6th day of February, 1911, together with all title thereafter acquired by them.

I do further certify and report that I have executed to the said purchaser the usual sale certificates provided for by the laws of the State of Idaho at execution sales for said property and delivered the originals thereof to the said purchaser and have filed duplicates of said sale certificates in the office of the Recorder of Bingham County, Idaho.

And I further certify that said sales were made by me subject to confirmation by the Court and also subject to the statutory redemption period of one year provided by the laws of the State of Idaho.

I further certify that the following is a statement of the Special Master Commissioner's fees and disbursements on said sales, to-wit:

Fee of Special Master Commissioner on sale..	\$25.00
Cost of filing two duplicate sale certificates..	1.00
Cost of publishing sale notice.....	22.50
	<hr/>
Total	\$48.50

And I do further certify that the complainant being the purchaser at said sale no moneys were received by me on said sale, except the sum of Forty-eight and 50-100 Dollars to cover my fees and disbursements on said sale, which amount was paid to me by the said purchaser and except the sum of Four Thousand Six Hundred Sixteen and 58-100 (\$4616.58) Dollars, being the amount due on the day of sale under said decree to the defendant D. W. Standrod & Company, as Trustee, which last named amount was paid to me by the said purchaser.

I further certify that the said complainant gave to me its receipt for the balance of the purchase prices of the said tracts as being applied upon the amounts found due to it under the said decree, which said receipt is hereto attached and filed herewith.

Herewith I pay into Court to the Clerk of this Court the said sum of Four Thousand Six Hundred Sixteen and 58-100 (\$4616.58) Dollars received by me, as aforesaid, for and on account of the amount due under said decree to D. W. Standrod & Company, as Trustee.

Dated this 2nd day of March, 1914.

H. J. HASBROUCK,
Special Master Commissioner.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Complainant,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., and
Geo. A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

The undersigned hereby acknowledges as received
from H. J. Hasbrouck, Special Master Commis-
sioner herein by the acceptance of its bids at the
sale held in said action of the properties described
in the decree, on March 2nd, 1914, of the following
amounts:

Upon the bid for the property situate in the Vil-
lage of Shelley, Idaho, the sum of Three Thousand
Three Hundred Thirty Four and 92-100 (\$3334.92)
Dollars.

On account of the bid upon the farm lands de-
scribed in the decree in said action the sum of Three
Thousand and no-100 (\$3000.00) Dollars.

Dated March 2nd, 1914.

ST. CLAIR & ST. CLAIR,
Attorneys for Complainant.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Complainant,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

United States of America,
District of Idaho,
Eastern Division,
Bingham County,—ss.

Byrd Trego of said County of lawful age being
by me duly sworn on his oath says: That he is now
and at all times hereinafter mentioned was a citizen
of the United States and of the State of Idaho, and
a resident of the City of Blackfoot, in said County
and State and is wholly disinterested in said cause
and is competent to testify as a witness therein.

That he is now and was at all times herein men-
tioned one of the printers and publishers of The
Idaho Republican which was at all times herein
mentioned and now is a weekly newspaper printed,
regularly issued, and having a general circulation
in the County of Bingham and State of Idaho and
that a notice of Special Master Commissioner's sale,

of which the annexed printed notice is a true, compared and correct copy, was printed and published in the regular entire weekly issue of said newspaper and not in a supplement thereof, on Friday of each and every week for five consecutive weeks immediately prior to and preceding such sale, the first publication of which notice was on Friday the 30th day of January, 1914, and the last publication of which was on Friday the 27th day of February, 1914.

That said County of Bingham is the County in which said property so advertised to be sold was and is situated and that during all times herein mentioned said newspaper was regularly distributed to its subscribers.

BYRD TREGO.

Subscribed in my presence and sworn to before me this 2nd day of March, 1914.

(N. P. Seal)

C. V. FISHER,
Notary Public.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Complainant,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt,
et al.,

Defendant.

Notice of Sale.

Notice is hereby given that in pursuance and by virtue of a decree in the above entitled cause, of the above entitled court, dated December 2, 1913, and a certified copy thereof issued to me, I, the undersigned, Special Master Commissioner, by virtue of my appointment as such by the said decree, will sell at public sale, to the highest bidder for cash in hand, lawful money of the United States, subject to confirmation and subject to the right of redemption provided by law, at the front door of the County Court House at Blackfoot, Idaho, on the 2nd day of March, 1914, at the hour of two o'clock p. m., of said day all and singular the property and premises hereinafter more specifically described, to-wit:

The following described tract will be sold to satisfy the costs and expenses of sale and the sum of Thirty-five Hundred Ninety and 67-100 (\$3590.67) Dollars, with accrued interest thereon, found due to the defendant, D. W. Standrod & Company, as Trustee, and the sum of Thirteen Thousand One Hundred Seventy-five and 75-100 (\$13,175.75) Dollars, with accrued interest thereon found due to the said complainant, to-wit:

Beginning at the Northwest corner of lots one (1) and two (2) of block eighteen (18) of the Townsite of Shelley, Bingham County, Idaho, thence East seventy-five (75) feet; thence South one hundred and thirty-two (132) feet; thence West to the East boundary line of the O. S. L. Ry. right of way; thence Northeast along said right of way to the

place of beginning, together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

The following described tract will be sold to satisfy the said amount and accrued interest thereon found due to the complainant, to-wit:

The South half of the Southwest quarter ($S1\frac{1}{2}$ $SW\frac{1}{4}$) and the Northwest quarter of the Southwest quarter ($NW\frac{1}{4}$ $SW\frac{1}{4}$) of Section thirty-four (34) in Township one (1) North of Range thirty-seven (37) East of B. M. in Bingham County, Idaho, together with all the improvements, privileges and appurtenances thereunto belonging.

The said sale will be conducted and made according to the rules and practice of the above named court, and to satisfy the amounts due and to become due as is in said decree provided, for principal and interest and the costs and expenses of sale, or so much thereof as such property will bring at such sale.

The usual sale certificates will be issued at said sale to the successful bidders and if said sale is confirmed and redemption is not made, as permitted by law, deeds will issue to such purchasers.

Dated the 24th day of January, 1914.

H. J. HASBROUCK,
Special Master Commissioner.

(Endorsed): Filed March 3, 1914. A. L. Richardson, Clerk. (Copy of Decree attached.)

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Complainant,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Received of A. L. Richardson, Clerk of the above
entitled court, the sum of Four Thousand Six Hun-
dred Sixteen and 58-100 Dollars, said sum being due
to the defendant, D. W. Standrod & Company, a cor-
poration, in satisfaction of the judgment heretofore
rendered herein whereby the said D. W. Standrod &
Company, a corporation, as Trustee for E. E.
Rodgers and F. C. Rodgers, was adjudged to be en-
titled to said sum for the said E. E. Rodgers and F.
C. Rodgers, said payment being made pursuant to
the order of confirmation of sale this day filed herein.

D. W. STANDROD & COMPANY, Trustee.

By John W. Jones,
Residence, Blackfoot, Idaho,
Of counsel for said defendant.

Dated March 10, 1914.

ORDER CONFIRMING SALE OF SPECIAL
MASTER.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Complainant,

VS.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Order Confirming Sale.

This cause came on to be further heard at Pocatello, Idaho, this 10th day of March, 1914, at two o'clock p. m. of said day and the proofs of the complainant being made and the said cause having been argued by counsel for complainant thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

That the report of H. J. Hasbrouck, as Special Master Commissioner in said action, filed with the Clerk of this Court on March 3rd, 1914, and the sales made by him of the property described in the decree heretofore rendered and entered in said action, as set forth in said report, be and the same are hereby approved and confirmed and that proper and

legal conveyance of all the said properties so sold are hereby directed to be executed, acknowledged and delivered to the purchaser named in the said report, being the complainant in this action, by the said H. J. Hasbrouck, as Special Master Commissioner, after the expiration of one year from the date said sales were made, to-wit: March 2nd, 1914, as to said sales or either of them as to which redemption or redemptions are not made as permitted by the laws of the State of Idaho.

It is further ordered, adjudged and decreed that the sum of Four Thousand Six Hundred Sixteen and 50-100 (\$4616.50) Dollars, being part of proceeds of sale of the property situate in Shelley, Idaho, described in the decree herein and being the amount due to the defendant, D. W. Standrod & Company, as Trustee, under said decree at the date of sale of said property, be by the Clerk of this Court, in whose hands the same now is, paid over to the said defendant, D. W. Standrod & Company, as Trustee, or its attorney herein, John W. Jones, in satisfaction of the amounts found due under said decree to the said D. W. Standrod & Company, as Trustee, under the Rodgers mortgage.

Dated at Pocatello, Idaho, this 14th day of March, 1914.

FRANK S. DIETRICH,
Judge.

(Endorsed): Filed March 14, 1914. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

VS.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Petition on Appeal.

The above named defendant and appellant, as Trustee for the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, its other *cestui que trusts*, E. E. Rodgers and F. C. Rodgers, and the defendant, Frank C. Bowman, as Trustee in Bankruptcy of the estate of N. C. Mickelson, having been notified in writing to appear and join in this appeal, and having refused to join, conceiving itself aggrieved by the judgment and decree entered in the above entitled court and cause on the 2nd day of December, 1913, and by the proceedings had and orders made leading up to said judgment, doth hereby appeal from said orders, judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is

filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers, upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated this 23rd day of May, 1914.

WILLIAM A. LEE,

Attorney for Defendant and Appellant,

Residence and P. O. Address, Blackfoot, Idaho.

Boise, Idaho, May 23rd, 1914.

And now, to-wit: On this day it is ordered that the foregoing appeal be allowed as prayed for. The defendant, Frank C. Bowman, as Trustee in Bankruptcy of the estate of N. C. Mickelson, a bankrupt, and E. E. Rodgers and F. C. Rodgers, also represented in this action by the defendant and appellant, D. W. Standrod & Company, having waived the right of appeal and refused to join herein, a severance is hereby granted as to them. The bond on appeal is fixed at the sum of \$300.00.

FRANK S. DIETRICH,

District Judge.

(Endorsed) : Filed May 23, 1914. A. L. Richardson, Clerk. E. B. Yarrington, Deputy.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,
Plaintiff,

VS.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,
Defendants.

Assignment of Errors.

D. W. Standrod & Company, a corporation, as
Trustee for the Idaho Lumber Company, Ltd., a cor-
poration, and Geo. A. Lowe Company, a corporation,
defendant and appellant herein, on behalf of and in
so far as the interests of said *cestui que trusts* are
affected by the judgment and decree entered in the
above entitled court and cause on the 2nd day of De-
cember, 1913, and by the trial, proceedings and
orders had and made leading up to said judgment,
hereby assigns errors in the following particulars:

I.

Because the Court holds and decides that the Ida-
ho Mechanic's Lien Law, Section 5118, R. C. Idaho,
1907, which provides that no lien shall bind any
building, etc., for a longer period than six months

after the claim has been filed, unless proceedings be commenced to enforce such lien should have interpolated therein after the word "commenced" the additional words "against the person, or persons, against whose interests the lien is asserted."

II.

Because the Court refused to hold that under the Idaho Mechanic's Lien Law a lien would continue to bind the property if an action was commenced in a proper court within six months after the same was filed, against the owner of the property.

III.

Because the Court holds and decides that under the Idaho Mechanic's Lien Law a lien is barred against all subsequent mortgagees not made parties to an action to foreclose such lien within six months from the time the same is filed.

IV.

Because the Court refuses to give any effect to Section 5114, R. C. Idaho, 1907, which prefers a mechanic's lien to a mortgage or encumbrance attaching subsequent to the attachment of such lien holder's claim.

V.

Because the Court holds and decides that the judgment and decree and order of sale and sale thereunder, obtained and had in the District Court of the Sixth Judicial District of Idaho, in and for

Bingham County, to enforce the respective mechanic's liens of the Idaho Lumber Company and Geo. A. Lowe Company and all proceedings had in said State Court thereunder, were void as against plaintiff and respondent, because it had not been made a party to said proceedings in the State Court.

VI.

Because the Court did not hold that plaintiff's and respondent's action to foreclose its mortgage should have been an action in equity to permit it to redeem as against defendant's and appellant's foreclosure and sale under the decree obtained in the State Court.

VII.

Because the Court, by its judgment and decree entered December 2, 1913, held and decided in favor of plaintiff and respondent and against appellant and defendant, representing as Trustee the interests of said *crestui que trusts*.

VIII.

Because the Court held and decided that the premises sold under the decree and order of sale made by the State Court be sold under this decree and the proceeds under said second sale be first applied to the payment and discharge of the E. E. and F. C. Rodgers mortgage lien, and that thereafter the remainder of said proceeds be applied to the discharge of plaintiff's and respondent's mortgage lien, and that as against plaintiff's and respondent's said

mortgage defendant's and appellant's judgment and decree obtained in the State Court was null and void.

IX.

Because the Court held and decided that defendant and appellant should be denied any relief under its petition filed October 15, 1913, and did not hold that plaintiff's and respondent's lien was void as an unlawful preference, or that said issue as thus raised should be first heard and determined, and because it permitted its Trustee in Bankruptcy, Frank C. Bowman, to dismiss the action that he had previously brought to set aside plaintiff's and respondent's mortgage, and permitted its said Trustee, Frank C. Bowman, to agree with the plaintiff and respondent that for a money consideration he, the said Frank C. Bowman, as Trustee, would not defend against, or contest, plaintiff's said mortgage, and in holding that defendant's and appellant's *cestui que trusts* were not entitled to be heard upon the issue as to the validity of plaintiff's mortgage and the right of said Trustee in Bankruptcy to dismiss said action and his stipulation not to defend against plaintiff's mortgage.

Dated at Blackfoot, Idaho, this 23rd day of May, 1914.

WILLIAM A. LEE,

Attorney for Defendant and Appellant,
Residence and P. O. Address: Blackfoot, Idaho.

(Endorsed): Filed May 23, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

VS.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Waiver and Refusal to Join in Petition on Appeal.

The above named defendants, Frank C. Bowman, as Trustee in Bankruptcy of the estate of N. C. Mickelson, a bankrupt, by O. E. McCutcheon, his attorney, and E. E. Rodgers and F. C. Rodgers, represented by D. W. Standrod & Company, a corporation, as Trustee, by their attorney, John W. Jones, and said defendants, to the extent of their said several interest in the above entitled action, hereby expressly waive the right of appeal from that certain judgment and decree entered in said cause on December 2, 1913, and hereby refuse to join the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, whose interest is represented in said action by D. W. Standrod & Company,

a corporation, as Trustee, in their petition on appeal from said judgment.

Dated at Idaho Falls, Idaho, this 21st day of May, 1914.

O. E. M'CUTCHEON,

Attorney for Frank C. Bowman, as Trustee.

Dated at Blackfoot, Idaho, this 21st day of May, 1914.

JOHN W. JONES,

Attorney for E. E. Rodgers and F. C. Rodgers.

(Endorsed): Filed May 23, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.

PRAECIPE FOR RECORD ON APPEAL.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

*Praecipe for Record on Appeal of D. W. Standrod &
Company, as Trustee.*

To the Hon. Alonzo L. Richardson, Clerk of the
United States District Court, for the District of
Idaho:

Whereas the above named defendant, D. W. Standrod & Company, a corporation, as Trustee for the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, as defendant and appellant, has heretofore, to-wit, on the 23rd day of May, 1914, filed herein its petition on appeal, assignment of errors and a citation against the Utah Implement-Vehicle Company, a corporation, plaintiff and respondent, and said citation has been allowed and service of the same has been accepted by Clency St. Clair and Charles C. St. Clair, attorneys for plaintiff and respondent, and defendant and appellant having filed a bond on appeal, defendant, Frank C. Bowman as Trustee in Bankruptcy of the estate of N. C. Mickelson, a bankrupt, and E. E. Rodgers and F. C. Rodgers, having been notified in writing and refused to join this defendant and appellant in said appeal:

You will please have prepared, certified and printed, according to law and the rules and practices of this Court, a transcript on appeal of the record as follows:

1. Bill of Complaint of plaintiff and respondent.
2. Answer of D. W. Standrod & Company, Trustee.
3. Reply of plaintiff to set-off and counterclaim of D. W. Standrod & Company, Trustee.
4. Supplemental Pleading of D. W. Standrod & Company, Trustee, filed herein as of October 15, 1913.

5. Supplemental Pleading on behalf of Frank C. Bowman, Trustee, filed herein as of October 15, 1913.

6. The order of the Court made thereon as of the 15th day of October, 1913, denying the relief prayed for in said Supplemental Pleading.

7. The decision of the Court made and filed herein as of November 18, 1913.

8. The decree of the Court herein made and entered as of December 2, 1913.

9. That the petition on appeal and allowance of the same, the assignment of errors on behalf of said defendant and appellant, and the citation and acceptance of service of the same by the attorneys and solicitors for plaintiff and respondent, be incorporated in the record.

10. Bond on appeal.

WILLIAM A. LEE,

Attorney and Solicitor for the defendant and appellant, D. W. Standrod & Company, a corporation, as Trustee for the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation; residence, Blackfoot, Idaho.

State of Idaho,
County of Bingham,—ss.

I, William A. Lee, being first duly sworn, upon oath say: That as attorney and solicitor for the defendant and appellant herein I deposited in the post-office at Blackfoot, Idaho, postage prepaid, a copy of

the above and foregoing Praeceptum, addressed to St. Clair & St. Clair, at Idaho Falls, Idaho, attorneys and solicitors for plaintiff and respondent, on this 29th day of May, 1914.

WILLIAM A. LEE.

Subscribed and sworn to before me this the 29th day of May, 1914.

(N. P. Seal)

C. S. BEEBE,
Notary Public.

(Endorsed): Filed June 2, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.

PRAECEPTUM FOR ADDITIONAL RECORD ON
APPEAL.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Praeceptum for Additional Record on Appeal.

To the Hon. Alonzo L. Richardson, Clerk of said
Court:

In addition to the matters to be included in the
Transcript on Appeal named in the praecipe filed in

said action on behalf of D. W. Standrod & Company, as Trustee, you will also please include in said transcript the following:

1. The report of H. J. Hasbrouck, Special Master Commissioner, as filed in said action.

2. The order of said Court confirming the report of H. J. Hasbrouck, as Special Master Commissioner, and confirming the sales therein reported.

3. All orders, receipts or checks, with the endorsements thereon, relating to or connected with the payment by you, as Clerk of said Court, in said action, to D. W. Standrod & Company, as Trustee, of the moneys paid into your hands as Clerk in said action by the said H. J. Hasbrouck, Special Master Commissioner.

Dated this 1st day of June, 1914.

ST. CLAIR & ST. CLAIR,
Attorneys and Solicitors for Utah Implement-Vehicle Company, plaintiff and appellee; residence, Idaho Falls, Idaho.

State of Idaho,
Bonneville County,—ss.

Charles C. St. Clair, being first duly sworn, upon his oath says: That he is one of the solicitors for the appellee Utah Implement-Vehicle Company in the above entitled action, and that he deposited in the United States postoffice at Blackfoot, Idaho, a copy of the foregoing Praecipe, enclosed in a sealed envelope, with postage prepaid thereon, addressed to

William A. Lee at Blackfoot, Idaho, the attorney and solicitor for said appellant, on the 1st day of June, 1914.

CHARLES C. ST. CLAIR.

Subscribed in my presence and sworn to before me this 1st day of June, 1914.

(N. P. Seal)

CLENCY ST. CLAIR,
Notary Public.

(Endorsed): Filed June 3, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.

BOND ON APPEAL.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Bond on Appeal.

Know all men by these presents:

That we, F. C. Christ and F. W. Mitchell, both of
the County of Bingham and State of Idaho, are held
and firmly bound unto the above named Utah Im-

plement-Vehicle Company, a corporation, plaintiff and respondent, in the sum of Five Hundred Dollars, to be paid to the said Utah Implement-Vehicle Company, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated this the 29th day of May, 1914.

Whereas, the above named D. W. Standrod & Company, a corporation, as Trustee for the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, defendant and as appellant herein, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, to reverse the decree rendered in the above entitled suit by the Judge of the District Court of the United States for the District of Idaho, Eastern Division, the defendant, Frank C. Bowman, as Trustee in Bankruptcy of the estate of N. C. Mickelson, a bankrupt, and E. E. Rodgers and F. C. Rodgers, having refused to join in said appeal, and an order of severance having been made as to them.

Now, therefore, the condition of this obligation is such that if the above named D. W. Standrod & Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall

be void; otherwise, the same shall be and remain in full force and virtue.

F. C. CHRIST,
F. W. MITCHELL.

State of Idaho,
County of Bingham,—ss.

F. C. Christ and F. W. Mitchell, being severally duly sworn, each for himself says that he is a resident and a free-holder in said County, State and District, and is worth the sum specified in the foregoing undertaking as a penalty thereof over and above his debts and liabilities, exclusive of property exempt from execution.

F. C. CHRIST,
F. W. MITCHELL.

Subscribed and sworn to before me this the 29th day of May, 1914.

(N. P. Seal)

GEO. F. GAGON,
Notary Public.

Approved this the 4th day of June, 1914.

FRANK S. DIETRICH,
Judge.

(Endorsed) : Filed June 4, 1914. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

vs.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to the plaintiff
and respondent, the Utah Implement-Vehicle Com-
pany, a corporation, greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit to be held at the City of
San Francisco, in the State of California, within
thirty days from the date of this writ, pursuant to
an appeal filed in the Clerk's office of the District
Court of the United States, for the District of Idaho,
Eastern Division, wherein you, the Utah Implement-
Vehicle Company, a corporation, are plaintiff and
respondent, and D. W. Standrod & Company, a cor-
poration, as Trustee for the Idaho Lumber Com-
pany, Ltd., a corporation, and Geo. A. Lowe Com-
pany, a corporation, is defendant and appellant, to

show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 23rd day of May, A. D. 1914, and of the Independence of the United States the one hundred and thirty-eighth.

FRANK S. DIETRICH,
United States District Judge for the District of
Idaho.

Attest: A. L. Richardson, Clerk. By E. B. Yarrington, Deputy Clerk.

Service of the foregoing Citation is accepted this the 26th day of May, 1914.

ST. CLAIR & ST. CLAIR,
Attorneys for plaintiff and respondent, the Utah Improvement-Vehicle Company, a corporation.

RETURN TO RECORD.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

A. L. RICHARDSON,
Clerk.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

UTAH IMPLEMENT-VEHICLE COMPANY, a
Corporation,

Plaintiff,

VS.

FRANK C. BOWMAN, as Trustee in Bankruptcy
of the Estate of N. C. Mickelson, a Bankrupt, and
D. W. STANDROD & COMPANY, a Corporation,
as Trustee for Idaho Lumber Company, Ltd., Geo.
A. Lowe Company, E. E. Rodgers and F. C.
Rodgers,

Defendants.

Clerk's Certificate.

I, A. L. Richardson, Clerk of the District Court of
the United States for the District of Idaho, do here-
by certify the foregoing transcript of pages num-
bered from 1 to 112, inclusive, to be full, true and
correct copies of the pleadings and proceedings, in
accordance with the praecipis on file herein, in the
above entitled cause, and that the same together con-
stitute the transcript of the record herein upon ap-
peal to the United States Circuit Court of Appeals
for the Ninth Circuit.

I further certify that the cost of the record herein
amounts to the sum of \$. ~~136.00~~ ^{136.00} . . and that the same
has been paid by the appellant.

Witness my hand and the seal of said Court, af-
fixed at Boise, Idaho, this 10th day of June, 1914.

A. L. RICHARDSON,
Clerk.

No. 2437

In The
United States Circuit Court of Appeals
For the Ninth Circuit

UTAH IMPLEMENT-
VEHICLE COMPANY,
a Corporation

Appellee,

vs.

D. W. STANDROD & COM-
PANY, a Corporation, as Trus-
tee for Idaho Lumber Company,
Ltd. and Geo. A. Lowe Company,
Corporations,

Appellant.

Brief for Appellant

WILLIAM A. LEE,
Attorney for Appellant.

Filed 1914.

..... Clerk.

Service of the within brief acknowledged
..... 1914.

Filed

DEC 23 1914

Attorney for Appellee.

F. D. Monckton,

Clerk.

In the United States Circuit Court of Appeals
For the Ninth Circuit.

UTAH IMPLEMENT-
VEHICLE COMPANY,
a Corporation

Appellee,

vs.

D. W. STANDROD & COM-
PANY, a Corporation, as Trus-
tee for Idaho Lumber Company,
Ltd. and Geo. A. Lowe Company,
Corporations,

Appellant.

Appellant's
Brief

STATEMENT

This is an appeal from a judgment and decree of foreclosure in favor of appellee, the Utah Implement-Vehicle Company.

A statement of the case is found in the decision of the lower court (pp. 64-66 record) as follows:

“DIETRICH, District Judge:

“A very brief statement of the facts will
“suffice to make clear the nature of the single
“question which has been argued and submitted
“for decision. The suit is brought to foreclose
“a mortgage given to the plaintiff by N. C. Mick-
“elson on the 6th day of February, 1911, to se-
“cure the payment of a promissory note of the
“same date for \$12,575.75, which mortgage was,
“on February 21, 1911, recorded in the office of
“the County Recorder of Bingham County, Ida-
“ho, where the property is situate. Mickelson
“later became a bankrupt, and his Trustee is
“made a party defendant. The other de-
“fendant, D. W. Standrod & Company, a
“corporation, is the Trustee for the Idaho
“Lumber Company and others, who claim liens

“upon or equitable interests in the mortgaged
“property. It is unnecessary to explain the nature
“of this trust further than to say that the inter-
“ests of all beneficiaries thereof save one orig-
“inated in mechanic’s liens for services rendered
“and materials furnished in the construction of
“a building upon a portion of the mortgaged
“premises. The original validity of these liens
“is not now called into question, and for the
“purposes of the decision it is assumed that in
“due time the several parties filed their claims
“of lien in the form prescribed by law, and that
“within the statutory period they commenced pro-
“ceedings in the proper state district court to
“enforce the liens, and that such suits were con-
“solidated, and later a decree was entered ad-
“judging the several claims to be liens upon the
“property of the mortgagor, and that thereafter
“the property was duly sold to satisfy the
“amounts adjudged to be due, at which sale
“Standrod & Company became the purchaser,
“as Trustee for all concerned. It is further as-
“sumed that while some of these claims were
“filed with the Recorder shortly before and some
“after the execution and recording of the plain-
“tiff’s mortgage, by relation the liens may have all
“antedated the lien of the mortgage. Although
“its mortgage was of public record when they
“were commenced, the mortgagee, the plaintiff
“here, was not made a party to the lien suits, and
“its contention now is that therefore not only is
“it not bound by such foreclosure proceedings, but
“also that through lapse of time the liens have
“been lost, and as to it they are no longer of any
“validity.

“The precise question, therefore, is, whether
“or not a lien claimant under the mechanics’ lien

“law of Idaho loses his priority of lien as against
“a junior mortgagee, by foreclosing his lien
“without bringing in and making a party to such
“foreclosure suit the mortgagee, the period pro-
“vided by the statute in which proceedings may
“be commenced for the enforcement of the lien,
“expiring during the pendency of the suit.”

Appellant supplements this statement made by the court below by adding that the appellant, for its *cestui que trusts*, Idaho Lumber Company, Geo. A. Lowe Company, and E. E. and F. C. Rodgers, paid off and discharged the prior lien for taxes and the laborers' liens of P. J. Johnson and D. F. Hagans at the foreclosure sale in the State Court had on January 4, 1912, and prior to the commencement of this action. The mortgage lien of E. E. and F. C. Rogers having been upheld by the court in this action as being prior to appellee's mortgage they did not join in this appeal, and a severance as to them, and also as to the trustee in bankruptcy, Frank C. Bowman, was granted. (p. 96 record.) Frank C. Bowman, trustee in bankruptcy, did not answer in this action, but agreed with appellee not to enter an appearance or defend in these foreclosure proceedings, (p. 45 record) but did file a reply to appellant's supplemental pleading. (pp. 53-63 record.)

Plaintiff makes the following assignment of errors:

ASSIGNMENT OF ERRORS.
(pp. 97-100 record.)

“D. W. Standrod & Company, a corporation, as Trustee for the Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, defendant and appellant herein, on behalf of and in so far as the interests of said

cestui que trusts are affected by the judgment and decree entered in the above entitled court and cause on the 2nd day of December, 1913, and by the trial, proceedings and orders had and made leading up to said judgment, hereby assigns errors in the following particulars:

I.

Because the Court holds and decides that the Idaho Mechanic's Lien Law, Section 5118, R. C. Idaho, 1907, which provides that no lien shall bind any building, etc. for a longer period than six months after the claim has been filed, unless proceedings be commenced to enforce such lien should have interpolated therein after the word "commenced" the additional words "against the person, or persons, against whose interests the lien is asserted."

II.

Because the Court refused to hold that under the Idaho Mechanic's Lien Law a lien would continue to bind the property if an action was commenced in a proper court within six months after the same was filed, against the owner of the property.

III.

Because the Court holds and decides that under the Mechanic's Lien Law a lien is barred against all subsequent mortgagees not made parties to an action to foreclose such lien within six months from the time the same is filed.

IV.

Because the Court refuses to give any effect to Section 5114, R. C. Idaho, 1907, which prefers

a mechanic's lien to a mortgage or encumbrance attaching subsequent to the attachment of such lien holder's claim.

V.

Because the Court holds and decides that the judgment and decree and order of sale and sale thereunder, obtained and had in the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, to enforce the respective mechanic's liens of the Idaho Lumber Company and Geo. A. Lowe Company and all proceedings had in said State Court thereunder, were void as against plaintiff and respondent, because it had not been made a party to said proceedings in the State Court.

VI.

Because the Court did not hold that plaintiff's and respondent's action to foreclose its mortgage should have been an action in equity to permit it to redeem as against defendant's and appellant's foreclosure and sale under the decree obtained in the State Court.

VII.

Because the Court, by its judgment and decree entered December 2, 1913, held and decided in favor of plaintiff and respondent and against appellant and defendant, representing as Trustee the interest of said *cestui que trusts*.

VIII.

Because the Court held and decided that the premises sold under the decree and order of sale made by the State Court be sold under this decree and proceeds under said second sale be first

applied to the payment and discharge of the E. M. and F. C. Rodgers mortgage lien, and that thereafter the remainder of said proceeds be applied to the discharge of plaintiff's and respondent's mortgage lien, and that as against plaintiff's and respondent's said mortgage defendant's and appellant's judgment and decree obtained in the State Court was null and void.

IX.

Because the Court held and decided that defendant and appellant should be denied any relief under its petition filed October 15, 1913, and did not hold that plaintiff's and respondent's lien was void as an unlawful preference, or that said issue as thus raised should be first heard and determined, and because it permitted its Trustee in Bankruptcy, Frank C. Bowman, to dismiss the action that he had previously brought to set aside plaintiff's and respondent's mortgage, and permitted its said Trustee, Frank C. Bowman, to agree with the plaintiff and respondent that for a money consideration he, the said Frank C. Bowman, as Trustee, would not defend against, or contest, plaintiff's said mortgage, and in holding that defendant's and appellant's *cestui que trusts* were not entitled to be heard upon the issue as to the validity of plaintiff's mortgage and the right of said Trustee in Bankruptcy to dismiss said action and his stipulation not to defend against plaintiff's mortgage."

The questions presented by the first eight assignments may all be included in this single proposition:

Under the provisions of the Idaho Mechanic's Lien Law must a lien claimant in addition to commencing an action to foreclose the same

against the owner of the property within the six months prescribed by the statute, also commence an action against all other persons claiming subsequent liens, by mortgage or otherwise, upon the property against which the lien is asserted?

The learned trial judge in his decision (pp. 69-70 record) again states the proposition thus:

“The real question, therefore, is, whether or not the commencement of a proceeding against one party in interest operates to keep alive the lien as to all parties in interest. It will be observed that Section 5118 does not purport in terms to prescribe who shall be made parties to the suit, either plaintiff or defendant, and in giving to it a practical construction it is necessary to interpolate a designation or description of the parties. Defendant would make the clause, “unless proceedings be commenced in a proper court. etc.,” read, “unless proceedings be commenced in a proper court *against the owner of the property, etc.,*” whereas the plaintiff would have it read, “unless proceedings be commenced in a proper court *against the person or persons against whose interests the lien is asserted, etc.,*”

ARGUMENT

That part of the Revised Codes of Idaho, 1907, material to this controversy is as follows:

“Section 5118. No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six months after the claim has been filed unless proceedings be commenced in a proper court within that time to enforce such liens, etc.”

“Section 5114. The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance. etc.”

Section 5120 classifies the various kinds of liens and prescribes the order in which the courts shall give them preference, the order being:

1. All laborers other than contractors or subcontractors.

2. All material men other than contractors or sub-contractors.

3. Sub-contractors.

4. The original contractor.

“Section 5121. Any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them, etc.”

“Section 5124. Except as otherwise provided in this chapter the provisions of this Code relating to civil actions new trials and appeals are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter, etc.”

Proceedings to foreclose a mechanic's lien under the Idaho law is a proceeding in equity.

Idaho & Ore. L. I. Co. vs. Bradbury 132 U. S. 509.

Robertson vs. Moore, 10 Ida. 115; 77 Pac. 218.

A settled canon of construction is that if a statute is valid it is to be given effect according to the purpose and intent of the law maker, and the intention is to be ascertained by considering the entire statutory law relating to that subject.

Sutherland on Statutory Construction. Secs. 234 and 239.

From the language of the various provisions relating to mechanic's liens, as well as the settled practice in Courts of the State, it is clear that the law intends and does prefer a mechanic's lien to any mortgage or other incumbrance which may attach subsequent to the time when the structure was commenced, work done, or material furnished.

The section of the statute giving the right to a lien is as follows:

“Section 5110. Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, etc. * * * or performing labor in any mine, etc., has a lien upon the same for work or labor done or material furnished, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, etc.”

The decision of the Court below (pp. 65 76 record) very ably sets forth the reasons for the conclusions reached by the Court. It would be difficult to make a better presentation of appellee's contention than has been done in this opinion, but with all due respect to the learned Judge, who reaches the conclusion that this is the construction that must be given to these various provisions of the Mechanic's Lien Law, we do not think that such was the intention of the Legislature. It is scarcely believable that after the law making power has, during a long series of years, followed a policy of extending the right to file liens, making them preferred above mortgages, giving lien claimants rights not allowed in most other states, such as the right to recover attorney's fees, for their enforcement without a reciprocal right to the defendant, and generally surrounding this class of liens with every pro-

vision favorable to the lien claimant, that it, in fact, intended the law to be what this decision holds it to be.

Under this construction of the lien law, a laborer having a right to a lien for a modest sum of only a few dollars upon an extensive line of work, such as a railroad or large irrigation works, must, at the peril of losing his claim, be put to the expense of bringing into court all other lien claimants, however numerous, whether by mortgage or subsequent liens, when he seeks to enforce the same. This consideration may not be of much value in determining what the law-making power actually has done with regard to declaring who are necessary parties in a lien foreclosure, but it is a cogent reason in the mind of all familiar with the general policy of both the Legislature and the Court as to why no such requirement was intended.

Under the construction contended for by appellant no injustice is worked upon the holder of a subsequent lien or mortgage. For he is given the right to intervene in the foreclosure proceedings, or may bring an independent action to redeem, and in such action he has the right to challenge the validity of a lien as effectively as in a direct proceedings to foreclose.

It is not controverted that the holder of a subsequent mortgage lien need not be made a party to the foreclosure of a prior mortgage, but it is urged that he is a necessary party to the foreclosure of a prior mechanic's lien, and must be brought into the suit within the six months limitation or the lien holder loses all rights against such subsequent mortgagee. A reason suggested by the decision (p. 72 record) is that disputes not infrequently arise between mortgagees and lien claimants that a lien often rests

entirely in parol, etc. is not entitled to great weight. In the one case the mortgagee's lien arises by agreement of parties; in the other it is created by law upon the happening of certain events. In either case subsequent mortgagees may ordinarily challenge the validity of such prior incumbrance upon any ground that the owner might have done.

If the holder of a prior mortgage forecloses the same without making the holder of a subsequent mortgage a party, the latter would not thereafter in a proper proceeding be prevented from contesting the validity, priority or amount of such mortgage, and the same right exists with reference to a mechanic's lien under like conditions.

As said by the learned Judge, the decided cases are not entirely in unison.

We assert with much confidence in the correctness of our position that a careful analysis of practically all of the decisions of the State Courts that have announced a doctrine contrary to our contention have done so by reason of the statutes of such states relative to the foreclosure of mechanic's liens being radically different from the Idaho laws.

We are equally certain that the decisions of the Courts cited below which support our contention are decisions that are based upon statutes essentially the same as the Idaho law.

De La Vergne Refrigerating Company vs. Montgomery Brewing Company, 6 C. C. A. 272; 57 Fed. 111, sets forth and construes several sections of the Alabama Code relating to mechanic's liens and foreclosure proceedings thereunder.

"Section 3041. Limitations. Except in cases hereinafter provided, all liens arising under this

chapter shall be deemed lost unless suit for the enforcement thereof is commenced within six months after the maturity of the entire indebtedness secured thereby.”

There is no essential difference between this provision in the Alabama Code and Section 5118 of the Idaho Code above quoted.

There is a marked similarity between the provisions of Sections 3018, 3019 and 3030 of the Alabama Code set forth in the opinion *haec verba* and Sections 5110, 5114 and 5121 of the Idaho Code.

After quoting Section 3041 the opinion proceeds to state:

“Our opinion is that Section 3041 has no application to incumbrancers, but refers only to suits against the owner or proprietor. The proceedings as to incumbrancers is governed by Section 3030, which confers upon the material man the right either to join incumbrancers, or to omit them. He is authorized but not required to make them parties. *Trammell vs. Hudman*, 78 Ala. 224. If suit for the enforcement of a lien be commenced against the owner or proprietor within six months after the maturity of the indebtedness secured by it, the lien is not lost; and our opinion is that incumbrancers may at any subsequent time be made parties to the proceeding.”

“In *Monk et al. vs. Exposition Deepwater Pier Corporation, et al.* 68 S. E. 280. (Sup. Ct. App. of Va. June 9, 1910.) the Court says:

“In other words, the holding amounts to this: That though a suit to enforce a mechanic’s lien is brought within due time against the debtor upon whose property the lien rests, the failure to implead subsequent lienors within six months defeats the lien so far as such incumbrancers are concerned.

“This is plainly an erroneous construction of the mechanic’s lien act. There is no statutory requirement that subsequent incumbrancers shall be made parties, and, though they are *proper parties*, they are not *necessary parties* to such suit.”

The opinion quotes somewhat at length the provisions of the Virginia statute, and it is apparent that the law relative to mechanic’s liens and foreclosure of the same is similar to the provisions found in the Idaho Code.

The Court cites *De La Vergne Refrigerating Co. vs. Montgomery Brewing Company*, *supra*, and adds “The United States Circuit Court of Appeals of the Fifth Circuit in construing the Alabama statute, which is substantially the same as the Virginia Act, says that if suit for the enforcement of a lien be commenced against the owner within six months * * * the lien is not lost, etc.”

Cornell vs. Conine-Eaton Lumber Company, 47 Pac. 912. (Ct. App. Colo. Dec 14, 1896.

The Court says:

“It is contended by counsel for appellant that he was an indispensable party, and that not having been made a party in the lien proceedings, he is not concluded by them, nor his title in any way affected. The validity of this claim is the only question presented for determination in this case. The proceedings to create and enforce liens of mechanics, etc., is purely statutory. Any material departure from the provisions of the statute invalidates the proceedings. But like all other cognate acts, Courts are required to liberally

construe the statute to effectuate the intention of the legislature and gives the beneficiaries under the act the right and remedy sought to be established.”

The opinion then sets forth the provisions of the Colorado Code at length. An examination of these provisions will show that there is a marked similarity between the Colorado Code and the Idaho Code relating to the claim and enforcement of mechanic's liens. I direct particular attention to this for the reason that the learned trial Judge in commenting on case at bar, says:

“It is made clear that the conclusion reached was the result largely, if not entirely, of the emphasis placed upon a provision of the statute not found in the Idaho Law.” (p. 74 record.)

Doubtless reference is here had to the provisions of Sections 2153 of the Colorado Code quoted in the second column of page 913 as follows:

“The owner of the property to which such lien shall have attached shall be made a party to the action.”

It has never been suggested that under Section 5118 of the Idaho Code a foreclosure proceedings could be maintained without making the owner of the premises a party, and the Colorado Code provision found in Section 2152 is therefore only a statutory declaration of what is universally conceded to be a requirement of the Idaho Code.

Section 2161, Section 16 c. l. laws, 1887; Section 17; Section 22, and Section 2149 of the Colorado Code have their exact counterparts in the Idaho Code.

While the learned Judge below was unable to attach much weight to the Colorado decision by reason of the supposed dissimilarity of the laws

of the two states, as tending to sustain his views, in the next paragraph he cites Dunphy vs. Riddle, 86 Ill. 22; Crowl vs. Nagle 86 Ill 437; McGraw vs. Bayard, 96 Ill. 146, (p. 75 record.)

In this connection we direct the attention of this court to the language in De La Vergne Refrigerating Co. vs. Montgomery Brewing Co. *supra.*, wherein that court says:

“The Illinois cases cited by the counsel for the appellees have no application here. Reference to them will show that the court was construing a statute of that state which, the court says, requires that material men shall enforce their rights against all parties (creditors or incumbrancers) having, or claiming to have, an interest in the premises, by suit to be commenced against them within six months, and that the law means that parties having an interest shall be parties to the suit, etc.”

In Monk vs. Exposition Deepwater Pier Corporation, *supra.*, that court says at page 281, column 2,

“The cases relied on by counsel for the appellees are controlled by local statutes, and have no application to a case arising under the Virginia statute, the provisions of which are essentially dissimilar.”

In Cornell vs. Conine-Eaton Lumber Co., *supra.*, at page 914, the court says:

“The difference between the statutes of Illinois, under which the decisions were made, and our statute is very marked.”

And the opinion proceeds at great length to point out the distinction, and quotes Phillips on Mechanic's Liens, Section 397, wherein that author says:

“A mortgagee is not an owner within the meaning of the mechanic's lien law, and is not

entitled to notice of a suit upon a lien claim. The owner, under such a statute, of the legal estate is alone to be made a party.”

And again the opinion reads:

“Liens being purely creatures of statute, Mr. Phillips cites and discusses the statutes of several states, in some of which mortgagees are specifically made necessary parties; but when discussing statutes like our own where there is no provision requiring them to be made parties, he clearly states as in the paragraph above cited, that a mortgagee is not within the meaning of the mechanic’s lien laws, and is not entitled to notice of a suit upon a lien claim.”

It is quite apparent from the excerpts above given that the learned trial Judge in this case has fallen into the error of basing his conclusions largely upon a line of authorities that should be given no weight whatever by reason of a marked dissimilarity in the statutes of the states from whence such decisions come.

As authority tending to support the contention of appellant not much weight was given by the court below to the following cases:

Gaines vs. Childers, (Or.) 63 Pac. 487.

Whitney vs. Higgins, 10 Cal. 547; (Pac St. R. Book 3, Vol. 10 Cal. 547, and note, to case p. 531.)

Gamble vs. Voll, 15 Cal. 507; (Pac. St. R. Book 5, Vol. 15 Cal. 507.)

Gaines vs. Childers, *supra*, was decided June 7, 1901, the opinion being by Bean, C. J., and while the conclusion reached by the court might have been done without necessarily determining the question involved in this appeal, it is evident

from an examination of the opinion that this was the principal question considered. There can be no doubt about the opinion supporting plaintiff's contention in this case and in unequivocally holding that Section 415 of the Oregon statute, which provides "Any person having a lien subsequent to the plaintiff upon the same property, or any part thereof, * * * shall be made a defendant in the case," does not require the lien claimant to make subsequent mortgagees parties to a foreclosure at peril of losing his right of lien against such parties.

And the learned Judge proceeds to say, after quoting 9 Enc. Pl. & Prac. 300:

"If incumbrancers are not made parties to a suit to foreclose a lien they are, of course, in no respect bound by the decree or proceedings thereunder; but the decree itself is valid, and vests in the purchaser the legal right to the premises and the right in a proper proceeding to compel such lien creditors to redeem."

After citing the following authorities in support of this proposition, *Sellwood vs. Gray*, 11 Or. 534; 5 Pac. 196; *Koerner vs. Iron Works*, 36 Or. 90; 58 Pac. 863, the court proceeds to say:

"The same is true in a suit to foreclose a mechanic's lien. Persons holding liens upon the premises by judgment or mortgage are not indispensable parties to such a suit. The only effect of not joining them with the owners of the premises is that the decree is not binding upon them, and does not cut off or deprive them of the right of redemption."

He then gives as supporting this proposition the California cases above cited.

It is also true that *Whitney vs. Higgins*, *supra* might have been finally determined without a decision of the particular question here involved.

But the opinion of Field, Judge, is of interest as tending to show that the Court made no distinction between the foreclosure of a mortgage and a mechanic's lien in respect to who should be parties, for it says:

“A mechanic's lien is purely the creature of statute. A decree for the sale of the premises in its enforcement has the same and no greater effect upon the rights of purchasers and incumbrancers prior to the commencement of the suit than a similar decree would have upon the foreclosure of a mortgage.”

As we have observed, three of the courts above mentioned have specifically pointed out why the Illinois decisions are not of any value in determining the question here presented because of the dissimilarity of its laws. We have endeavored also to show that the laws of the states from whence these decisions arose supporting appellant's position were in all essentials like those of Idaho.

The statutes of all the different states from whence the authorities are cited as tending to support appellee's position are not at this time available to the writer hereof, and it may be that the statute law from some of these states is similar to the Idaho law. If so, then in the language of the learned trial Judge, “it is a question upon which the decided cases are not entirely in unison.”

So far as we have been able to ascertain, this precise question has never been decided by a Federal Court except in the one case above referred to. *Refrigerator Co. vs. Brewing Co.* 6 C. C. A. 272; 57 Fed. 111, *supra*

In the late case of *Davis vs. Bartz*, 118 Pac. 334 (Sup. Ct. Wash. October 24, 1911,) much re-

lied upon by appellee, the opinion does not indicate any radical difference between the Washington statutes and the Idaho law relating to mechanic's liens.

It should be observed, however, that a determination of this question was not necessary to a decision in that case because the court does hold that the appellant was estopped from asserting a priority under his lien by reason of having himself first taken the mortgage and subsequently assigned the same, which he was seeking to defeat. Upon every consideration of equity he might have been denied relief upon this ground alone.

In the opinion the court says that its attention had not been called to any adverse authority except the case of *Cornell vs. Conine-Eaton Lumber Company*, 9 Colo. App. 225; 47 Pac. 912. above referred to, thus indicating that in *Davis vs. Bartz*, *supra* that the case was not thorough briefed.

In that case the court attaches much significance to the Indiana cases referred to. An examination of these cases will show that they are not founded upon any authority outside of the courts of that state and appear to be based upon a former ruling made by that court to the effect that the foreclosure of a prior mortgage has no effect upon a junior mortgagee not made a party to such proceedings.

Un. Nat. Sav. & L. Ass'n. vs. Helberg, 51 N. E. 916.

The Nebraska authorities given are not entitled to much weight because that court has held both ways on the question.

Manly vs. Downing, 15 Nebr. 637; 19 N. W. 601.

Under the peculiar statutes of that state that court has held that foreclosure proceedings begun against the owner are not binding upon his subsequent grantor, even when the mortgagee has no notice of such change in interest.

It is a very general and well settled rule of law that a lien claimant, by mortgage or otherwise, whether he be prior or subsequent, is not bound by a foreclosure proceedings to which he was not made a party. But there is no reason in equity why a prior lien holder, whether by mortgage or mechanic's lien, should have his foreclosure proceedings against the owner and his sale thereunder declared a nullity, and his cause of action barred against a subsequent lien holder who stood idly by and refused to intervene in such action, or bring an independent action. Such subsequent lien holder should be permitted to redeem, and the better reason and the better considered authorities so hold, under statutes similar to the Idaho law.

This is the rule announced by Justice Field, concurred in by Terry and Baldwin, in *Whitney vs. Higgins*, *supra*. It is a leading case and very frequently cited by courts and text book writers of the present day, and has not been overruled, criticized or modified, so far as we have observed.

The doctrine that subsequent incumbrancers not made parties to a foreclosure proceeding by the holder of a prior incumbrance or lien, "are in no wise affected by the decree and their liens remain unimpaired" is too broad a statement of the principle.

The correct doctrine is stated in the carefully considered case of *Carpentier vs. Brenham*, 40 Cal. 221, (Pac St. R. Vol. 13, 221.) wherein the court announces the rule as follows:

(Page 235.) “The point seems to be that the plaintiff should not be compelled to redeem the first mortgage, because it has become merged in the legal title by a proceeding which the plaintiff disavows and holds for nought.

“But in the first place the foreclosure in favor of Moss is not void, and in the second place Moss, the purchaser at the sale, did not, as against the plaintiff, merge his equitable rights as a first incumbrancer in the legal title. The Moss decree is not void. It is not absolutely essential to make subsequent incumbrancers parties to a foreclosure suit. If not so made, they are not bound by the decree, but they are not necessary parties as between the mortgagor and the mortgagee, and in many cases where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so. (*Montgomery vs. Tutt*, 11 Cal. 307.) Subsequent incumbrancers are not necessary, though proper parties, to an action to foreclose a mortgage. (14 Cal. 549; *Story Eq. Pleadings*, 196; 33 Cal. 32.)

“The decree, therefore, is valid for every purpose, except that it cannot be used to deprive the representatives of Catharine Hayes (holder of second mortgage) of any rights she possessed when the Moss suit was brought, or the decree therein entered.”

(Page 236) “When the mortgagor and mortgagee contract, the former agrees, that, in case of a breach of the agreement on his own part, the latter shall sell the land, and that the purchaser at such sale shall acquire the legal title, relieved of the lien, as of the date of the execution of the mortgage. A subsequent mortgagee knows of this relation between the parties, and what he agrees

to accept as a security for his money is a claim upon the surplus of the proceeds of the first foreclosure sale beyond the prior debt. He has no estate in the land itself, nor any lien upon the land, except subject to the prior lien, that is he has a right to be paid out of the excess; that is, in effect a right to redeem, and incidentally—if made a party to a foreclosure suit—a right to defend by pleading the Statute of Limitations, or the invalidity in whole or in part of the plaintiff's claim, or that it is paid. These are not, however, substantive and primary defenses, but grow out of his right to redeem.

(Page 237) “But if the junior mortgagee shall bring his senior into Court, shall he be permitted to ignore his claims as senior mortgagee? The right then of the plaintiff as against the purchasers at the Moss foreclosure sale, was a right to redeem.”

In *Frates vs. Sears*, 144 Cal. 246; 77 Pac. 905, the Court refers to *Carpentier vs. Brenham*, *supra*, and apparently criticizes the doctrine there announced for it says:

“If the court meant to hold that plaintiff could not avail herself of the Statute of Limitations as against the first mortgage by reason of the foreclosure of the first mortgage, we are inclined to distrust the logic of that opinion. It was clear on the facts of the case that more than four years had elapsed after the judgment of foreclosure on the first mortgage before the suit on the second mortgage was begun, and that at the beginning of the latter suit the time limited by law for suing on the first mortgage had fully elapsed.”

But *Carpentier vs. Brenham* holds clearly that the bringing of an action to foreclose by the prior incumbrancer prevents the statute from

running against his mortgage and in favor of the subsequent incumbrancer. Both upon principle and by the great weight of authority this is the better doctrine. Otherwise all subsequent incumbrancers would be as necessary in a foreclosure proceedings by the prior mortgagee as would be the mortgagor, and all of the authorities to the effect that subsequent lien holders are proper but not necessary parties would be misleading and simply invite a course of procedure that would result in the first lien holder finally losing his interest in the mortgaged property.

That is to say, if the rule that a subsequent mortgagee is not bound by a foreclosure proceedings to which he is not a party, brought by the prior mortgagee against the owner and that it does not in any manner affect the rights of such subsequent mortgagee, then he is a necessary party as much as the mortgagor. Otherwise the Statute of Limitations would run in his favor in the same manner that it would run in favor of the mortgagor, and upon so running his lien would become the first and the only effective title against the property, and the rights of the prior mortgagor, although foreclosed against the owner, would be void against the subsequent mortgagee, who, as said in *Carpentier vs. Brenham*, *supra*, took his second mortgage knowing the relations between the mortgagor and the prior mortgagee, and agreed to accept as his security a claim upon the surplus.

In *Monk et al vs. Exposition Deepwater Pier Corporation* *supra*, the Court says:

“It is true that in some cases one creditor may set up the statute of limitations to defeat the demand of another creditor against the common debtor; but to sustain such plea it is essential to show that the co-creditor’s debt is barred as be-

tween himself and his debtor. McCartney vs. Tyner, 94 Va. 198; 26 S. E. 419; Callaway's Adm'r. vs. Saunders, 99 Va. 350, 38 S. E. 182."

We are unable to see wherein Hassal vs. Wilcox, 130 U. S. 905; 9 Sup. Ct. Rep. 590, supports appellee's contention herein. In that case Wilcox, the lien claimant, had apparently by collusion with the president of the railroad secured a judgment in the state court, by what was in effect an *ex parte* proceedings, for an alleged mechanic's lien under the somewhat unusual provisions of a Texas statute, that is conceded in point of time to have been subsequent to the plaintiff's bond holders mortgage. In a foreclosure proceedings by a representative of the bond holders' interest the court held that the judgment of the state court was not conclusive against the interest of the bond holders. It would be difficult to understand how upon any equitable principle a different conclusion could have been reached under the unusual facts of that case.

II.

IX ASSIGNMENT OF ERROR.

The ninth assignment of error is based upon the refusal of the court to grant appellant any relief under its supplemental petition filed October 15, 1913.

A brief statement of the facts relative thereto will present the alleged errors predicated upon the court's ruling.

This case was tried October 15, 1913, at Pocatello, Idaho. As is well known, the principal seat of this court is at Boise, Idaho, and the files for the other divisions of the District are taken by the Clerk to the place of holding the term. On September 23rd preceding the trial of this case

appellee served its reply to appellant's answer and cross-complaint, and for the first time appellant was advised of the facts set forth in paragraph 12 of said reply.

We maintain that the admitted facts as they appear from appellee's reply (pp. 44-45 record) appellant's pleading (pp. 47-51 record) and the supplemental pleading of Frank C. Bowman, trustee in bankruptcy for the bankrupt Mickelson (pp. 53-56 record) establish this state of facts:

(1.) That prior to the commencement of this foreclosure proceedings Frank C. Bowman, as trustee for the bankrupt Mickelson, began an action in the U. S. District Court against the appellee who was defendant in such action to set aside and vacate appellee's mortgage for the reason that the same was voidable and in conflict with the act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," and particularly Sections 60a and 60b thereof, for the reason that such mortgage constituted an unlawful preference.

(2.) That in said complaint it was further charged by said trustee that the appellee had been given a mortgage by the said bankrupt, Mickelson, for the sum in excess of the indebtedness owing by Mickelson to it for \$4000.00.

(3.) That at great expense to the creditors of said estate testimony was taken tending to establish said allegations and issue joined in said action.

(4.) That the trustee found by a personal examination of the books of appellee, the defendant in said action, that it had taken this mortgage from the said bankrupt Mickelson shortly prior to

his being adjudged a bankrupt, for the sum of \$2800.00 in excess of what he rightfully owed it.

(5.) That subsequent to this and prior to appellee bringing this action to foreclose its said mortgage it paid to said trustee in bankruptcy the sum of \$800.00 for and in consideration that said trustee would not resist or defend against foreclosure of appellee's said mortgage, and that he would dismiss the action then pending and at issue brought to set aside and avoid said mortgage upon the grounds in his bill of complaint stated.

(6.) That upon appellant being advised of these conditions just prior to the trial of these foreclosure proceedings it sought by its supplemental pleading to have the same held in abeyance until the action theretofore dismissed by the trustee could be reinstated and heard, or in the event that the stipulation between the trustee and appellee was not vacated and the trustee ordered to proceed with said cause of action, then and in that case that appellant be permitted to do so.

We submit that under the state of the record as it appears from the conceded facts referred to in the record, that appellant was entitled to a hearing upon the issues presented by appellee's reply, its supplemental pleading, and the supplemental pleading of the trustee in bankruptcy, that the direct result of the court's ruling in denying this relief resulted in the \$800.00 paid by the appellee to the trustee in bankruptcy being diverted from the mortgage security that belonged to the lien holders of this property, and transferring the same to the common creditors.

Upon the record here presentd, and for the reasons herein assigned, appellant asks that the

judgment be reversed and all proceedings had thereunder be vacated.

Respectfully submitted,
WILLIAM A. LEE,
Attorney for the Appellant, D. W. Standrod
& Company, Trustee for the Idaho Lumber
Company, Ltd., and Geo. A. Lowe Company.

No. 2437.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE
NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

vs.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE
FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A.
LOWE COMPANY, CORPORATIONS,
Appellant.

BRIEF OF APPELLEE

*Appeal from the District Court of the United States for
The District of Idaho, Eastern Division.*

Filed

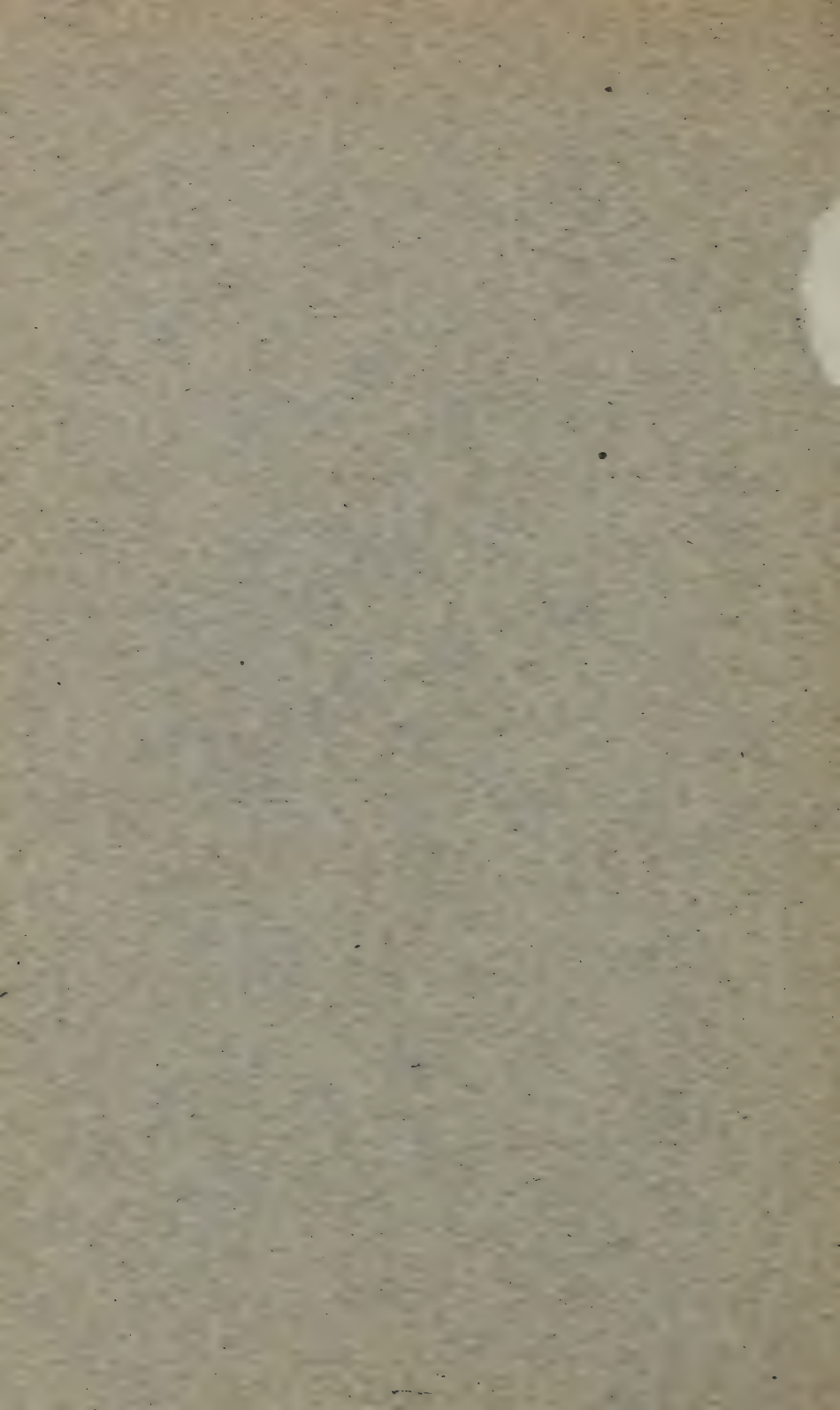
CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

JAN 14 1915

Filed....., 1915.

F. D. Monckton,

.....Clerk.



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BRIEF OF APPELLEE

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CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed....., 1915.

.....Clerk.

STATEMENT.

MAY IT PLEASE THE COURT:

The statement in the brief for appellant that the defendant Frank C. Bowman, as Trustee for N. C. Mickleson, bankrupt, did not answer in the action, is not correct. The transcript does not show an answer, but it does not show that he did not answer, and as a matter of fact, he did file an answer to plaintiff's complaint.

The defendant, D. W. Standrod & Company, was defendant in this case as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers. The Trustee filed a joint answer as Trustee for all four of those for whom it was made a defendant as Trustee and the decree awarded a first lien upon the property under the Rodgers mortgage to the defendant, D. W. Standrod & Company, as Trustee for all four of the beneficiaries.

This appeal is prosecuted by D. W. Standrod & Company as Trustee for Idaho Lumber Company and Geo. A. Lowe Company only, and on behalf of E. E. Rodgers and F. C. Rodgers a sererance was granted by the lower Court permitting an appeal by the Trustee on behalf of the Idaho Lumber Company and Geo. A. Lowe Company.

The decree of the trial Court awarded a first lien upon the Shelley property to D. W. Standrod & Company as Trustee for its four beneficiaries under the Rodgers mortgage, as purchaser at the foreclosure sale held under the decree rendered in the five suits to foreclose mechanic's lien and the one suit to foreclose the Rodgers mortgage. All six of the actions having been consolidated. The Court awarded a second lien upon the Shelley property to the plaintiff, Utah Implement-Vehicle Company and awarded nothing to D. W. Standrod & Company, as Trustee, as purchaser at the foreclosure sales under

the five mechanic's liens upon the ground, as shown by the Court's opinion, that the Utah Implement-Vehicle company not being a party defendant in the suits to foreclose the mechanic's liens and the Rodgers mortgage, was in no way bound thereby and that the mechanic's liens were barred under the provision of the Idaho Statutes as against the Utah Implement-Vehicle Company's mortgage by reason of suit to foreclose, such liens not having been brought against the Utah-Implement Vehicle Company within six months from the time of filing such liens.

On the day of trial and just prior thereto, the defendant Standrod & Company, as Trustee, submitted a supplemental pleading asking that an order entered into in the Bankruptcy proceeding, in the estate of N. C. Mickleson, bankrupt, permitting the Trustee to dismiss a former suit which had been brought by F. C. Bowman, as Trustee of the bankrupt, against the Utah Implement-Vehicle Company to set aside its mortgage as a preference, be vacated and set aside and asking the Court in this action to direct Bowman, as Trustee, to prosecute such action to final judgment or permitting D. W. Standrod & Company, as Trustee, to prosecute such action and asking that proceedings in this action be stayed pending the determination of such issues. To this supplemental pleading, the defendant, Bowman as Trustee, filed an answer and the trial Court, upon the hearing of the supplemental pleading, denied the relief prayed for in the supplemental pleading of D. W. Standrod & Company, as Trustee.

ARGUMENT.

The brief for appellant groups the first eight assignments of error under the one proposition as to whether a lien claimant under the Idaho Mechanic's lien laws must commence his foreclosure action within six months against a person claiming a subsequent mortgage lien.

The provisions of the Idaho statutes, which we believe affect the question proposed in appellant's brief, are as follows:

“Sec. 5118. No lien provided for in this chapter binds any buildings, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper Court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced.”

“Sec. 5113. The land upon which any building, improvements or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, * * * ”

“Sec. 5124. Except as otherwise provided in this chapter, the provisions of this Code, relating to civil actions, new trials and appeals, are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter: Provided, That the District Courts shall have jurisdiction of all actions brought under this chapter.”

Our contention is, and the trial Court held, that Idaho Code Section 5118, properly construed, means that the proceeding to foreclose the lien must be brought against

the owner and all encumbrancers by mortgage or otherwise against whom relief is sought, or it is desired to have the decree bind.

We do not understand that it is seriously contended for appellant that a junior mortgagee is bound by a decree in a mechanic's lien foreclosure unless he is a party thereto, and we believe that aside from the case of *Cornell vs. Conine-Eaton Lumber Company*, 47 Pac. 912 (Colo.) none of the cases hold that the junior mortgagee is bound by the decree unless he is made a party to the suit.

Sec. 397 of Phillips on Mechanic's Liens, is cited as holding that a mortgagee is not an owner within the meaning of the Mechanic's Lien law, and need not be made a party defendant, but an examination of Mr. Phillips' works will show that this statement is made merely as being the effect of a statute requiring only the owner to be made a defendant.

Mr. Phillips at Section 399 of his work on Mechanic's Liens, states the rule, where a suit to enforce a mechanic's lien is practically a chancery proceeding, to be that subsequent mortgages are necessary parties to foreclose their interests and that when the remedy provided is in the nature of an equitable proceeding to foreclose the lien, in analogy to the practice upon the foreclosure of a mortgage, with a view to the sale of fee-simple of the mortgaged premises, it would seem that all persons having a claim to have a lien thereon at the time of the commencement of the suit should be made parties.

The Supreme Court of Idaho has held in the case of *Jensen vs. Bumgarner*, 25 Idaho 355, that an action to foreclose a mechanic's lien is an action in equity.

The case of *Whitney vs. Higgins*, 10 Cal. 547, cited by appellant, expressly decides that if encumbrancers are not made parties to an action to foreclose a mechanic's

lien, they are not bound by the decree or the proceedings thereunder, and that an encumbrancer must be made a party, otherwise his rights will not be affected.

The case of *Gaines vs. Childers*, 63 Pac. 487 (Ore.) also cited by appellant, does not hold that the junior mortgagee need not be made a party defendant, but on the contrary, holds that in order to bind him by the decree, he must be made a party.

The conflict of authorities upon this question is not upon the question as to whether the junior mortgagee must be made a party defendant, in order to affect or bind him, but the conflict is as to the effect upon the lien itself, as against the junior mortgagee on account of the failure to make him a party. A few of the authorities, as pointed out in the opinion of Judge Dietrich, under statutes similar to the Idaho statutes, hold that while the junior mortgagee is not bound by the judgment, that the judgment in a mechanic's lien foreclosure, has the effect, in favor of the purchaser at a sale thereunder, of keeping the mechanic's lien alive indefinitely and thereby throwing upon the junior mortgagee the necessity of redeeming within the period permitted by the general statute of limitations, or if suit is brought for strict foreclosure of his right of redemption by the purchaser to require such junior mortgage to redeem within a short time to be fixed in the strict foreclosure action. The effect of those cases is that notwithstanding they hold in general terms that the junior mortgagee is not affected by the abortive foreclosure of the liens, that he is actually affected on account of the purchaser being given a longer time for foreclosure or asserting of his rights under the mechanic's lien, against the junior mortgagee, than the statute by its terms permit.

It is claimed that a Court of Equity will in a mortgage foreclosure, protect the rights of the purchaser in the

foreclosure sale as against a junior encumbrancer not made a party by keeping the lien of the mortgage alive, and a few of the authorities uphold this doctrine as to mortgage foreclosures.

In the brief for appellant, it is stated that it is not contraverted that a holder of a subsequent lien need not be made a party to the foreclosure of a prior mortgage, but we do not concede the truth of this statement, as we do not concede such a rule. In the argument in the lower Court, we conceded that the defendant, D. W. Standrod & Company, as Trustee, was entitled to a first lien for what was actually due under the Rodgers mortgage, notwithstanding the Utah Implement-Vehicle Company had not been made a party to the Rodgers foreclosure suit, but the concession was made on account of the fact that the Rodgers mortgage was not barred at the time of the trial of this case in the lower Court, and not because it was not necessary for them to make the Utah Implement-Vehicle Company a party defendant.

Even in mortgage foreclosures the authorities are uniform to the effect that the junior mortgagee is under no obligation to redeem, but that he may foreclose his junior mortgage as against a purchaser at a sale under a foreclosure of a prior mortgage if he was not made a party defendant to such foreclosure.

Catterlin vs. Armstrong, 79 Ind. 514.

Catterlin vs. Armstrong, 101 Ind. 258.

Memphis & L. R. R. Co. vs. State, 37 Ark. 632.

Anson vs. Anson, 20 Iowa 55.

Chilver vs. Weston, 27 N. J. Eq. 435.

Besser vs. Hawthorn, 3 Ore. 129.

Stewart vs. Johnson, 30 Ohio St. 24.

The Supreme Court of California in the case of *Frates vs. Sears*, 77 Pac. 905 (Cal.) is the only case we have been able to find wherein the effect on a first mortgage lien, of failure to make a junior mortgagee a party defendant, as regards the running of the statute of limitations against the first mortgage, is fairly and directly raised, considered and decided, and in that case the California Supreme Court held that "where a second mortgagee was not made a party to a suit to foreclose the first mortgage, and, at the time suit was brought to foreclose the second mortgage, the time limited by law for suing on the first mortgage had fully elapsed, the second mortgagee was entitled to plead the statute of limitations as a complete defense to any rights under the first mortgage."

Speaking of the decision in the case of *Frates vs. Sears*, supra, the Supreme Court of California in the case of *Wemple vs. Yosemite Gold Mining Company*, 87 Pac. 280 (Cal.) says: "In that case when the junior mortgagee who had not been made a party to the foreclosure of the senior mortgage brought his action to foreclose and made the senior mortgagee a party (who was the purchaser at his foreclosure sale) the latter failed in enforcing his prior lien because when he answered his mortgage debt had become barred by the statute of limitations. In the present case the senior mortgage was not barred when the answer was filed. The reasoning may go further, but the point decided in *Frates vs. Sears* was that the lien of the senior mortgagee is lost, if, when he asserts it against the foreclosure of the junior mortgage, his mortgage debt is barred."

The general rule as to the rights of a purchaser at a foreclosure sale under a first mortgage where a junior encumbrancer is not made a party defendant, is that the purchaser occupies no better position with respect to

the junior encumbrancer than if he had taken a deed from the mortgagor and an assignment of the first mortgage. The following cases are substantially to this effect:

Moulton vs. Cornish, 138 N. Y. 133.

Rodgers vs. Holyoke, 14 Minn. 220.

Sellwood vs. Gray, 5 Pac. 196 (Ore.)

Martin vs. Adams Brick Co. 102 N. E. 831 (Ind.)

The general statement of practically all the cases involving the question as to the rights of a junior encumbrancer not made a party to foreclosure of a first mortgage do not seem to take into consideration all of the questions that may arise, and the cases generally state that the junior mortgagee is not bound, if not made a party, but that he still has a right to redeem from the prior mortgage. The cases as we understand them do not go to the extent of holding that he must redeem from the prior mortgages whether there is a valid defense thereto, or not. The junior mortgagee would have a right to redeem from the prior mortgage if there had been no foreclosure, and, therefore, the effect of holding that he still has a right to redeem is equivalent to a holding that a foreclosure of a first mortgage without making him a party defendant, does not in any way affect his rights.

The reason that the question of statute of limitations against the lien of a purchaser at a foreclosure sale under a first mortgage, where the junior mortgagee is not made a party defendant, is not considered by many of the cases is, we think, because of the fact that in most of the cases the purchaser at foreclosure sale goes into the actual possession of the mortgaged property and becomes a mortgagee in possession before his mortgage is, in fact, outlawed and, therefore, it would do no good to plead the

statute of limitations because the statute does not run as against a mortgagee in possession.

As to mechanic's liens, even though it should be conceded that a prior mortgage does not outlaw as against a purchaser at a defective foreclosure sale, that ruling, if there is such a ruling, is a rule of equity which does not apply in a suit to foreclose a mechanic's lien, as there is no rule of equity which will keep a mechanic's lien alive after the expiration of the six months given by statute for its foreclosure. Section 5118 of the Idaho Code, expressly provides that the lien shall not bind the property for a longer period than six months after the claim has been filed. Unless proceedings be commenced in a proper Court within that time to enforce such lien, equity cannot step in and give vitality that the statute denies.

The Supreme Court of Indiana in the case of Deming-Colborn Lumber Co. vs. Union National Savings & Loan Association, 51 N. E. 936 upon this point, says:

“In other words the year given by statute having expired without a foreclosure of the lien as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case of mortgages, maintain the senior lien on foot after the expiration of the year, when the statute declares it shall be void. By its foreclosure the lien holder not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and as such owner, could not question the right of the mortgagee to foreclose against the property, neither can the lien holder now do so—the year given him by statute to foreclose his lien having expired.”

Section 9 of Phillips on Mechanic's Liens as to the nature of a mechanic's lien, says:

“A mechanic's lien is not property, or a right in or to property. It is neither a *jus in re* nor a *jus ad rem*. It

is simply a right to charge the property it affects, with the payment of a particular debt, in preference and priority to other debts, so far as the statute confers such preference, if all the requisitions of the statute are observed. Of itself, when the statutory requisitions to its creation are observed, it has not the force and effect of a judgment, and is not self-enforcing, or self-executing. Until a judgment is obtained, in the mode pointed out in the statute, it is inchoate; and it is as dependant, for operation and effect, upon the rendition of a judgment, as the statute directs, as is the lien created by the levy of an attachment upon the rendition of a judgment in the attachment suit. It does not create even after being judicially established by judgment or decree, any privity of estate, or right of entry thereunder, * * *

Under the Idaho statutes above quoted, we contend that it was necessary within the statutory period of six months, for the mechanic's lien holders in this case to have brought their foreclosure actions making the Utah Implement-Vehicle Company a party defendant, and thereby giving notice to it of their claims of liens and giving to the Implement Company an opportunity, before too much time had elapsed, to defend against such liens and obtain evidence to support such defense.

In this particular case, it appears from the supplemental pleading filed on behalf of Bowman, as Trustee for the bankrupt, and by the report of sale made by the special master, that the mortgage of the Utah Implement-Vehicle Company is for a larger amount than the Shelley property is worth, after crediting the proceeds of sale of the farm property, and, therefore, Bowman as Trustee in bankruptcy, the sole defendant in the suits to foreclose the mechanic's liens, really had no interest in the property, and the Implement Company was really the only party to be affected by the foreclosures; yet, counsel

for appellant and a few of the cases upon the subject would require that the Implement Company be given only a right to redeem from the liens without an opportunity to defend against the same within the statutory period.

All of the mechanic's lien cases as to the question of statute of limitations, hereinafter cited, we believe, independent of questions of different statutory provisions, uphold our contention, but we call particular attention to the case of Deming-Colburn Lumber Company vs. Union National Savings & Loans Association, 51 N. E. 936 (Ind.), and the case of Davies vs. Bartz, 118 Pac. 334 (Wash.). In the latter case the Supreme Court of Washington holds:

“The only distinction, so far as here material between a necessary party and a proper party, is that a foreclosure of a lien without the one is absolutely void, while a foreclosure without the other is void only as to him.”

The Court further says:

“It is the manifest purpose of this statute (a statute exactly similar to Section 5118 of the Idaho Code) to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it, if the facts do not warrant the lien. The claimant must accord this opportunity within the time limited, or lose his lien. It is equally manifest that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority, if the evidence warrants either defense. He is entitled to his day in court upon these matters within the period fixed by the statute. In this respect, there is no valid distinction between necessary parties and proper parties.”

In addition to the matters the junior mortgagee is interested in and entitled to being heard upon, as called attention to in the case of *Davis vs. Bartz*, supra, the junior mortgagee in Idaho is also entitled, under the provisions of Section 5113 of the Idaho Codes, to being heard upon and to have determined by the decree of foreclosure of a mechanic's lien the question as to how much of the land upon which the building is constructed shall be bound by the lien.

The case of *Whitney vs. Higgins* in 10 Cal. 547, cited by appellant, did not involve the question of whether the mechanic's lien which had been previously foreclosed without making the junior mortgagee defendant, was outlawed or not, as the sole question involved in that case was whether the common law right of redemption existed or the statutory right of redemption. The action was brought by the junior mortgagee for a decree permitting him to redeem and the junior mortgagee did not contend or claim that the mechanic's lien was outlawed, and that point is not touched upon in the opinion of the Court.

The case of *Carpentier vs. Brenham*, 40 Cal. 221, has some language in the opinion favorable to the contention of the appellant, but it is intimated in the opinion that the junior mortgagee having the right to redeem incidentally and growing out of his right to redeem, had a right to defend against the prior lien, by pleading the statute of limitations. This case was analyzed in the case of *Frates vs. Sears*, 77 Pac. 905 (Cal.) and the opinion in that case holds that if the Court in the case of *Carpentier vs. Brenham* meant to hold that the plaintiff could not plead the statute of limitations, they are inclined to doubt the logic of that opinion.

The case of *De La Vergne Refrigerating Mach. Co. vs. Montgomery Brewing Co.*, 57 Fed. 111 (C. C. A. 5th Circuit), so much relied upon by appellant is directly in

point so far as the argument of the opinion as to the statute of limitations is concerned, but the entire opinion as to the statute of limitations is mere dictum as the Court in the latter part of the opinion holds that the amended bill making the mortgagees parties, was filed before the expiration of the six months allowed by statute after the debt became due for the foreclosure of the lien. As the statute of limitations had not run there was no such a question in that case.

We cite the following cases, which are also cited in the opinion of Judge Dietrich, as upholding our contention that the trial Court was right in holding that the mechanic's liens in this case were outlawed and that D. W. Standrod & Company, as Trustee, under its purchase at the foreclosure sale under said liens could not have a lien upon the Shelley property as against the mortgage of the Utah Implement-Vehicle Company:

Davis vs. Bartz, (Wash.) 118 Pac. 334.

Deming-Colborn &c vs. Union Nat'l &c., (Ind.)
51 N. E. 936.

Union Nat'l &c vs. Helberg, (Ind.) 51 N. E.
916.

Stoermer vs. People's Savings Bank (Ind.)
52 N. E. 606.

Green vs. Sanford (Neb.) 51 N. W. 967.

Ballard vs. Thompson (Neb.) 58 N. W. 1133.

Smith vs. Hurd, (Minn.) 52 N. W. 922.

Hakanson vs. Gunderson (Minn.) 56 N. W. 172.

Falconer vs. Cochran (Minn.) 71 N. W. 386.

Dunphy vs. Riddle, 86 Ill. 22.

Crowl vs. Nagle, 86 Ill. 437.

McGraw vs. Bayard, 96 Ill. 146.

Jacks vs. Sullivan (Mo.) 30 S. W. 890.

Badger L. Co. vs. Staley, (Mo.) 125 S. W. 799.

The opinion of Judge Dietrich set out in the transcript in this case at pages 64 to 76 inclusive, is very exhaustive, and fully covers the legal question involved, and we perhaps should not have gone to the trouble of seeking to add to that opinion by further argument.

NINTH ASSIGNMENT OF ERROR.

The claim that the Court erred in its refusal to grant the relief prayed in the supplemental pleading filed on the day of the trial by D. W. Standrod & Company, as Trustee, is without any merit.

A consideration of the pleading filed by Bowman, as Trustee in bankruptcy, against this supplemental pleading will convince the Court that there was no real ground for this application and that the facts did not justify the relief asked by the supplemental pleading, even though the trial Court in this action had power to grant such relief.

The record shows that the Trustee, in bankruptcy, had brought an action against the Utah Implement-Vehicle Company and that in such action after taking the testimony in British Columbia, of the bankrupt, the Trustee, in bankruptcy, and his attorneys were convinced that they had a very poor case; that the settlement made between the Trustee, in bankruptcy, and the Implement Company involved a claim of the Trustee to certain personal property which had been surrendered to the Implement Company by the Trustee, in bankruptcy, under claim of title; that the entire matter was submitted to the Court in the bankruptcy proceedings and the proposed

settlement approved by the Court and thereupon the Trustee dismissed the suit to set aside the alleged preference.

The showing by Bowman, as Trustee, in the record also makes it appear that the creditors claiming liens upon the Shelley property involved in this action, had not any of them filed general claims against the bankrupt estate, and also that the Trustee, in bankruptcy, had no interest of any value in that property because of the fact that the Rodgers mortgage and the mechanic's liens which had been foreclosed against the Trustee, in bankruptcy, amounted to more than the value of that property. The situation was simply that D. W. Standrod & Company, as Trustee on the date this case came on for trial, discovered that they could not, as they were seeking to do by their answer, raise the question of the plaintiff's mortgage being an unlawful preference and in order to promote their own interests, under their purchase of the Shelley property at foreclosure sale, they filed a supplemental pleading in this action seeking to have the Court in this action exercise powers that the Court would have in the bankruptcy proceedings, but not in this case, and seeking to require the Trustee, in bankruptcy, to repudiate a formal settlement which he had made, under the approval of the bankruptcy Court, and give up eight hundred dollars which he had received under that settlement and go into expensive litigation which he would have no hopes of winning and which could not result to his benefit at all.

It is not true, as stated in appellant's brief, that it was charged by the Trustee, in bankruptcy, in the complaint to set aside the preference, that the mortgage of Utah Implement-Vehicle Company was for four thousand dollars, or any sum whatever, in excess of Mickleson's indebtedness. The files in the bankruptcy proceedings and

in the preference suit and the deposition of Mickleson in the latter suit were offered in evidence at the hearing of this supplemental pleading but the same are not in the transcript of the record.

It is true that the Trustee, in bankruptcy, claimed that he had found by examination of the books of the Utah Implement-Vehicle Company, that the mortgage was taken for something like two thousand eight hundred dollars in excess of the debt due to the Implement Company, but that question was not involved in the suit to set aside the alleged preference, and the showing made by Bowman, as Trustee, is that the Implement Company denied this claim.

The showing on behalf of Bowman, as Trustee, also shows that the payment of eight hundred dollars was not alone in consideration of the dismissal of the suit to set aside the alleged preference, but that it was also in consideration of the settlement of all matters of difference between Bowman, as Trustee, and the Implement Company, and including the claim to the consigned goods which the Implement Company had retaken under its claim of title.

The matter of continuing or staying proceedings in this case was a matter largely in the discretion of the trial Court and the trial Court, after consideration of the application and the answer thereto and the files, deposition, and papers relating to the preference suit, and the bankruptcy proceedings, held that there was no merit in the application and denied the same. We submit that there was no abuse of its discretion by the trial Court.

It is well settled that a creditor cannot maintain a suit to set aside a preference, and that neglect or refusal of a trustee to bring or prosecute a suit to set aside a preference, does not entitle a creditor to maintain a suit in

his own name, but the proper remedy in such a case is an application to the bankruptcy Court to compel the Trustee to take requisite steps for the full and complete protection of the rights of the creditor.

Loveland on Bankruptcy (4th edition) Section 535.

Mr. Loveland states in said Section 535, "The Trustee will not be required to sue for property unless the estate is likely to be benefited by the suit."

The supplemental pleading of the appellant did not make any offer to furnish eight hundred dollars to the Trustee to refund to the Implement Company in the event the contract of settlement was repudiated nor did they in the application make any offer to bear the expense of prosecuting the suit to set aside the mortgage to the Implement Company as a preference.

We respectfully submit that the trial Court committed no error; that its judgment is a proper one, and that the same should be affirmed.

Respectfully submitted,

CLENCY ST CLAIR,

CHARLES C. ST. CLAIR,

Attorneys for Appellee,

Utah Implement Vehicle Company.

• No. 2437.

IN THE
**UNITED STATES CIRCUIT
COURT OF APPEALS**

FOR THE
NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

VS.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE
FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A.
LOWE COMPANY,

Appellant.

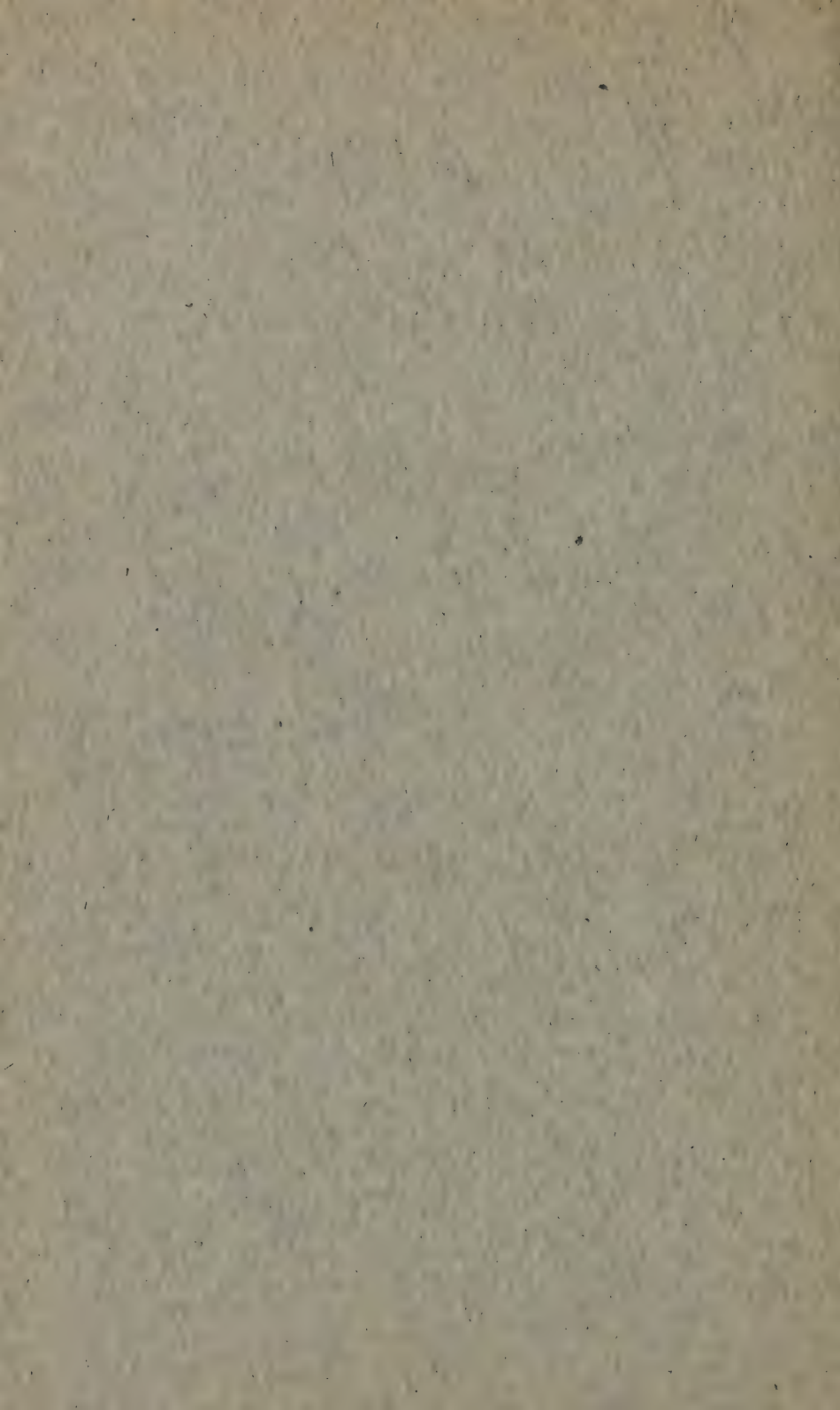
Motion to Dismiss Appeal

*Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed.....**Filed**....., 1915.

.....JAN 21 1915.....Clerk.



No. 2437.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

vs.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE
FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A.
LOWE COMPANY,
Appellant.

Motion to Dismiss Appeal

*Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed....., 1915.

.....Clerk.

MOTION TO DISMISS APPEAL.

Comes now the above named appellee, Utah Implement-Vehicle Company, and moves the Court to dismiss the appeal of the appellant D. W. Standrod & Company, as Trustee for The Idaho Lumber Company, Ltd., a corporation, and Geo. A. Lowe Company, a corporation, for the following reasons:

1. The said appellant waived any and all right of appeal from the decree rendered and entered in the lower Court in the above entitled action by its withdrawal of the sum of four thousand six hundred sixteen and 58-100 dollars (\$4,616.58) from the clerk of the lower Court, being a part of the proceeds of sale of the property in which the said appellant was interested under the said decree and being the amount due at the time of the sale of said property to the said appellant under the decree sought to ~~me~~ appealed from.

2. The appellant, D. W. Standrod & Company, as Trustee, is a party to this action, as Trustee for Idaho Lumber Company, Ltd., Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, and as such filed its answer in said action in the lower Court, and as such Trustee for said parties it was awarded a first lien upon the property in Shelley, Idaho, in which it was interested, while the appeal in this action is taken by the said D. W. Standrod & Company as Trustee for Idaho Lumber Company, Ltd., and Geo. A. Lowe Company. While a severance was granted by the lower Court for the purposes of this appeal, such severance was improper and not permissible.

3. No citation on appeal was issued in this action as to the defendant Frank C. Bowman, as Trustee in bankruptcy of the estate of N. C. Mickelson, a bankrupt, nor was any service of notice of appeal or of citation had upon the said defendant Frank C. Bowman, as such Trustee.

STATEMENT OF FACTS.

The foregoing motion is based upon the following facts appearing in the transcript of record of this action:

This action was instituted by the Utah Implement-Vehicle Company, for the purpose of foreclosing a mortgage upon certain real estate situate in Shelley, Idaho, and certain farm lands situate in Bingham County, Idaho, near Shelley, Idaho, belonging at the time of trial to Frank C. Bowman, as Trustee in bankruptcy of the estate of N. C. Mickelson, a bankrupt. The mortgage was given by N. C. Mickelson prior to his bankruptcy. Prior to the commencement of this action a number of actions were instituted in the District Court of Bingham County, Idaho, for the foreclosure of a mortgage held by E. E. Rodgers and F. C. Rodgers against the property in Shelley, Idaho, and five certain mechanic's liens against said property in favor of Idaho Lumber Company, P. J. Johnson, Geo. A. Lowe Company, D. F. Hagans and Crane Company. Those several actions were consolidated and proceeded to decree without the Utah Implement-Vehicle Company being made a party to any of such suits, and the property was sold under the decree to D. W. Standrod & Company, as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers. The proceeds of the sale were sufficient to satisfy the Hagans and Johnson liens and they were paid, together with the costs of Court and the sale costs, out of the proceeds of the sale of the property, while the liens of the Idaho Lumber Company, Geo. A. Lowe Company and the Rodgers mortgage lien were satisfied by the taking of title in the name of their Trustee. The Hagans and Johnson liens and the costs were paid pro rata by Idaho Lumber Company, Geo. A. Lowe Company and E. E. Rodgers and F. C. Rodgers.

This action proceeded to trial and a decree was entered awarding D. W. Standrod & Company, as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, a first lien upon the property in Shelley, Idaho, for an amount found due under the Rodgers mortgage, together with an attorney's fee of three hundred dollars (\$300.00) for the foreclosure thereof in this action, and the taxes found to have been advanced by the Trustee after it had purchased the property, and a second lien to the Utah Implement-Vehicle Company for the amount found due under its mortgage, and the property was ordered sold to satisfy such liens in their order of priority as fixed in the decree. Such decree provides that all the interests of all of the defendants in the property should pass by such sale.

An order of sale was issued under the decree in this action to the master appointed in the decree, and the property was sold to Utah Implement-Vehicle Company for the sum of eight thousand dollars (\$8,000.00), and the purchaser paid in cash an amount sufficient to satisfy the first lien awarded to D. W. Standrod & Company, as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers, and that amount was paid by the master to the clerk of the lower Court. Afterwards, the sale was confirmed and the money in the hands of the clerk ordered paid to D. W. Standrod & Company, as Trustee, and thereafter and prior to any steps being taken for an appeal in this action, D. W. Standrod & Company, as Trustee, through one of its attorneys of record in this action, received from the clerk the said sum of four thousand six hundred sixteen and 58-100 dollars (\$4,616.58).

After notice, the defendant Frank C. Bowman, as Trustee, and E. E. Rodgers and F. C. Rodgers, refused to join in an appeal from the decree in this action and

waived any right of appeal therefrom and thereupon the lower Court granted a severance and this appeal is prosecuted by D. W. Standrod & Company, as Trustee for Idaho Lumber Company and Geo. A. Lowe Company. The citation is not directed to D. W. Standrod & Company, as Trustee for E. E. Rodgers and F. C. Rodgers, nor Frank C. Bowman, as Trustee, nor was any notice of appeal served upon D. W. Standrod & Company, as Trustee for E. E. Rodgers and F. C. Rodgers, nor upon Frank C. Bowman, as Trustee for M. C. Mickelson, a bankrupt.

The plaintiff, Utah Implement-Vehicle Company, was awarded a first lien upon the farm land covered by its mortgage and that property was also sold under the decree and bought in by the plaintiff.

CLENCY ST. CLAIR,

CHARLES C. ST. CLAIR,

Attorneys for Appellee,

Utah Implement-Vehicle Company

NOTICE.

To Appellant D. W. Standrod & Company, as Trustee for Idaho Lumber Company and Geo. A. Lowe Company, and William A. Lee, its Attorney.

You are hereby notified that the foregoing motion will be called for hearing by the undersigned, before the United States Circuit Court of Appeals for the Ninth Circuit in the Court room of said Court, Room No. 326 in the United States Courthouse and Post Office building, N. E. Cor. 7th & Mission streets, San Francisco, California, on the . . . 11th . . . day of . . . *February* . . ., 1915, at the opening of the Court on said day, or as soon thereafter as counsel can be heard, and the said motion heard at that time, the said Court permitting.

Service of copy of foregoing motion and notice admitted this..... day of *February*, 191*5*

CLENCY ST. CLAIR,

CHARLES C. ST. CLAIR,

Attorneys for Appellant,

Utah Implement-Vehicle Company.

.....

Attorneys for Appellee,

D. W. Standrod & Company, as Trustee for Idaho Lumber Company and Geo. A. Lowe Company.

No. 2437.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee;

VS.

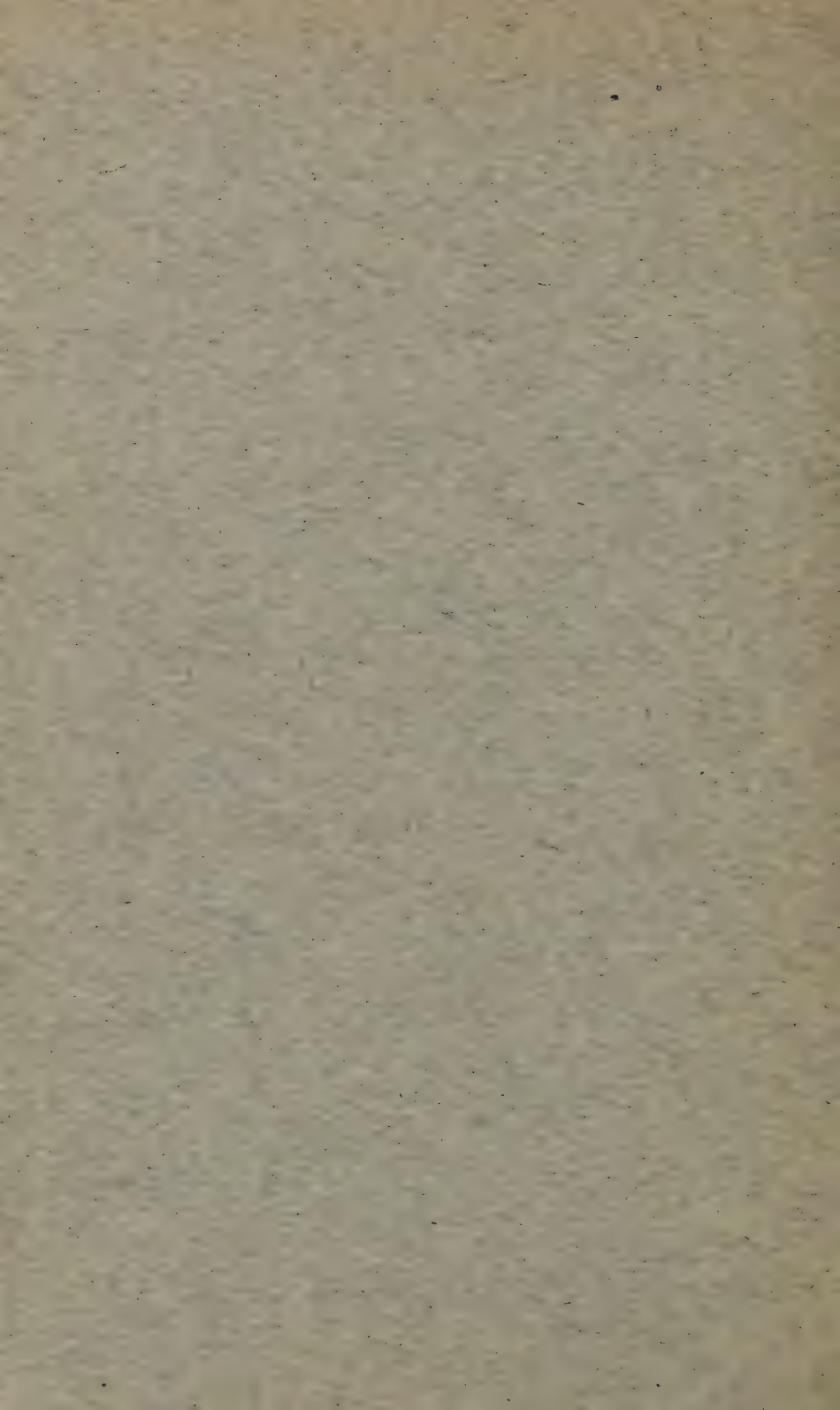
D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE
FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A.
LOWE COMPANY,
Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

*Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed....., 1915 **F. D. Monckton**
..... Clerk.



No. 2437.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

vs.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE
FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A.
LOWE COMPANY,
Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

*Appeal from the United States District Court for the
District of Idaho, Eastern Division.*

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed....., 1915.

.....Clerk.



I.

As appears by the Statement of Facts contained in the Motion to Dismiss the Appeal herein, the appellant, D. W. Standrod & Company, as Trustee, accepted the amount awarded to it, as Trustee, for all of its beneficiaries, by the decree in this action, out of the proceeds of the sale of the property upon which it was given a lien, and it, therefore, cannot appeal from such judgment and thereby seek to set aside the judgment under which it has received the benefits. This is a well settled principle of law.

C. Y. C. Title, "Appeal and Error." Volume 2, page 651, Sub-div. "E", and page 652, Sub-div. "B".

Webster-Glover &c Co. vs. St. Croix County, 36 N. W. 864 (Wis.).

Male vs. Harlan, 82 NW Rep. 179, (S. D.q.

State vs. Central Pac. R. Co. 26 Pac. Rep. 225 (Nev.).

Bechtel vs. Evans, 10 Idaho, 147.

Kansas City &c Co. vs. Murray, 47 Pac. Rep. 835 (Kan.).

While there is an exception to the above, it applies only to cases where the party appealing is absolutely entitled to what has been received under the decree and cannot in the event of the reversal of the judgment in any event fail to be entitled to receive what has been awarded by the decree. That exception does not apply to this case for the reason that the pleadings in this case do not concede that any amount whatever was due to D. W. Standrod & Company, as Trustee. While it is conceded by the

pleadings that such Trustee was entitled to be subrogated to the lien of the Rodgers mortgage, still the pleadings denied that there was anything due thereon. It is also conceded by the pleadings that under the Rodgers mortgage they would be entitled to an attorney's fee if there was anything due thereon, still the Court below allowed an attorney's fee of three hundred dollars (\$300.00), while the plaintiff denied that any greater amount than one hundred fifty dollars (\$150.00) was a reasonable attorney's fee. The tax payments recovered by the Trustee are also denied by the pleadings.

There can be no question but that if the contention of the appellant in this case be found correct as to the mechanic's liens being entitled to priority over the plaintiff's mortgage, D. W. Standrod & Company, as Trustee, should not have been awarded a lien at all upon the property, but the decree in that event should have awarded plaintiff a lien subject to the sheriff's sale for such liens, and dismissed the defendant D. W. Standrod & Company, as Trustee. In the event that the judgment in this case should be reversed, the effect of such reversal would be to vacate the sale made by the master under the decree in this case, and in that event the purchaser, Utah Implement-Vehicle Company, would be entitled to a return of the money paid by it which is now in the hands of D. W. Standrod & Company, as Trustee, and D. W. Standrod & Company, as Trustee, would have to return the money now in its hands to the clerk to be paid to the plaintiff, which, of course, is inconsistent with the idea that D. W. Standrod & Company, as Trustee, would in any event be entitled to the money which it has received under the decree in this case.

The following authorities hold that in the event of reversal of a judgment a party must restore any advantage obtained by the judgment, and that if there has been a

sale of the property, must restore the property, the sale not passing legal title until there is a deed:

Reynolds vs. Harris, 14 Calif. 667.

C. Y. C. Volume 24, page 39, Title, "Judicial Sales," Sub-div. "4".

C. Y. C. Volume 24, page 66, Title, "Judicial Sales," Sub-div. "6", Notes 78 and 80.

II.

As we understand, the rule is, that one of several defendants cannot appeal from the judgment unless a severance is granted by the trial Court. We find no authority for a defendant who is such as the representative of others being allowed a severance as to those whom it represents. In this case, D. W. Standrod & Company filed a joint pleading as Trustee for all of those for whom it is Trustee, it holding title to a sale certificate of the property as such Trustee and it obtaining a decree of the Court in its favor as Trustee for all. To allow it to appeal for a part only of those for whom it acts, leaves unrepresented in this action the others. It must be assumed that there is a difference of interests under the trust, as part of the beneficiaries refuse to join in the appeal, and, therefore, it must be assumed that those refusing to appeal are satisfied with the judgment and interested in allowing it to stand. The Trustee is, by its attempted appeal, acting partly for the interests of its beneficiaries and partly not. The beneficiaries for whom this appeal is not prosecuted, being E. E. Rodgers and F. C. Rodgers, cannot be heard on this appeal, as they were not parties to the action in the lower Court and are not parties to this appeal. We submit that D. W. Standrod & Company, as Trustee, must appeal for all of those for whom it acts or it cannot appeal at all.

III.

We do not understand that it is sufficient to obtain a severance as to a defendant and thereafter in the appeal ignore such other defendant, but we contend and believe that if a severance is granted, there must be a citation and notice to the defendant not appealing in order to make the appeal effective.

The defendant Bowman, Trustee, represents the estate of the bankrupt Mickelson, who was personally liable upon plaintiff's notes. If the judgment herein should be reversed, and thereby the sale of the property vacated, the liability of the bankrupt estate would be affected as the property might, on a re-sale, bring a smaller price. The Supreme Court of Idaho has held that a person liable for deficiency is a necessary party to an appeal seeking to set aside a foreclosure sale.

Miller vs. Wallace, 143 Pac. 524 (Idaho).

The defendant Bowman, as Trustee of the bankrupt estate, is directly interested in the question involved in this appeal by the ninth assignment of error as to the denial by the trial Court of the relief asked by the supplemental pleading of D. W. Standrod & Company, as Trustee.

Respectfully submitted,

CLENCY ST. CLAIR,

CHARLES C. ST. CLAIR,

Attorneys for Appellee,

Utah Implement-Vehicle Company.

